

DOCKET

Case: 85-1204-ASY
Status: GRANTED

Title: Charlie Wayne Rose, Appellant
v.
Barbara Ann McNeil Rose and Tennessee

Docketed:
January 17, 1986

Court: Court of Appeals of Tennessee, Eastern Division

Counsel for appellant: Jones, Jerry S.

Counsel for appellee: Davenport, Michael J., Cody, W.J.
Michael, Rose, Barbara Ann

EDITOR'S NOTE

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Entry	Date	Note	Proceedings and Orders
1	Jan 17 1986	G	Statement as to jurisdiction filed.
2	Feb 19 1986		DISTRIBUTED. March 7, 1986
3	Mar 6 1986	P	Response requested. (Due April 5, 1986 - NONE RECEIVED)
4	Apr 2 1986	X	Motion of appellee Tennessee to dismiss or affirm filed.
5	Apr 2 1986		REDISTRIBUTED. April 18, 1986
6	Apr 4 1986	X	Motion of appellee Barbara Ann McNeil Rose to dismiss filed.
7	Apr 21 1986	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
8	Jun 10 1986		REDISTRIBUTED. June 26, 1986
9	Jun 10 1986		Brief amicus curiae of United States filed.
10	Jun 30 1986		PROBABLE JURISDICTION NOTED. *****
11	Aug 8 1986		Joint appendix filed.
12	Aug 8 1986		Brief of appellant Charlie W. Rose filed.
13	Aug 14 1986		Brief amicus curiae of United States filed.
14	Aug 20 1986	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
15	Aug 23 1986	G	Motion of appellees for divided argument filed.
17	Aug 29 1986		Order extending time to file brief of appellee on the merits until October 15, 1986.
18	Oct 6 1986		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Scalia OUT.
19	Oct 6 1986		Motion of appellees for divided argument GRANTED. Justice Scalia OUT.
20	Oct 10 1986		Brief of appellee Tennessee filed.
21	Oct 15 1986		Brief amicus curiae of Women's Legal Defense Fund, et al. filed.
22	Oct 15 1986		Brief amicus curiae of Connecticut, et al. filed.
23	Oct 15 1986		Brief amicus curiae of California, et al. filed.
24	Oct 15 1986		Brief of appellee Barbara Ann McNeil Rose filed.
25	Oct 22 1986		CIRCULATED.
26	Dec 19 1986		SET FOR ARGUMENT. Wednesday, March 4, 1987. (2nd case).
27	Feb 24 1987	X	Reply brief of appellant Charlie W. Rose filed.
28	Mar 4 1987		ARGUED.

JURISDICTIONAL

STATEMENT

85-1206

Supreme Court, U.S.
FILED

JAN 17 1986

JOSEPH F. SPANIOLO, JR.
CLERK

NUMBER _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CHARLIE WAYNE ROSE,

APPELLANT,

VS.

BARBARA ANN MCNEIL ROSE, AND
THE STATE OF TENNESSEE,

APPELLEES.

ON APPEAL FROM THE COURT OF APPEALS,
EASTERN SECTION OF TENNESSEE,
AT KNOXVILLE.

JURISDICTIONAL STATEMENT

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70 P2

QUESTION PRESENTED BY THE APPEAL

Do state courts have jurisdiction to order child support payments and attorney's fees from veterans disability benefits, or does the Veterans Benefits Act of Congress preempt state law by the authority of the Supremacy Clause of the Constitution of the United States of America?

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JURISDICTIONAL STATEMENT

Opinion Below

The opinion appealed from is unreported, was decided by the Eastern Section of the Court of Appeals, state of Tennessee on August 14, 1985 and bears Case No. 150, Washington Law. Application for Permission to Appeal to the Supreme Court of Tennessee was denied by Order of that court on October 28, 1985, all of which is set forth in the Appendix, infra, pp. 1a, 22a.

Jurisdiction

a. Nature of the Proceeding

The Plaintiff-Appellee was awarded an absolute divorce from the Defendant-Appellant, a totally disabled Vietnam veteran, whose only means of support for himself is from Veterans and Social Security Benefits.

The parties have two minor children and the trial court ordered the Appellant to pay the sum of \$800.00 per month as and for support of the parties' two minor

children. The veteran received \$281.00 per month from the Social Security Administration and the balance of his financial resources came from the Veterans Administration, all in monthly disability benefit checks.

After having been cited into the trial court for contempt, the appellant filed his sworn affidavit stating that his only resources were from the Social Security Administration and Veterans Administration and alleged that the support order which had been entered was void for lack of subject matter jurisdiction, pursuant to 38 U.S.C., Sec. 211, 38 U.S.C., Sec. 3101 and *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed. 989 (1981), because the Congress had vested exclusive jurisdiction over Veterans benefits in the Administrator of the Veterans' Administration and, after making the state of Tennessee a party to the action, prayed for the trial court to declare any statutes which attempt to vest juris-

diction in the trial court over such matters to be unconstitutional as violating the Supremacy Clause of the Constitution of the United States of America.

The state of Tennessee entered its appearance and urged the trial court to find that it had jurisdiction over the controversy at issue, which the trial court did, by entering Summary Judgment in favor of the constitutionality of all of Tennessee support laws without regard for the laws of Congress. The Order granting Summary Judgment was entered on October 8, 1984 and all other matters were resolved by order entered October 29, 1984.

The appellant filed his appeal on November 2, 1984 and after oral argument the Court of Appeals, state of Tennessee affirmed the trial court's findings that it had jurisdiction over the veteran and his disability benefits for the purpose of entering and enforcing its order for

child support and remanded the matter to the trial court to allow the trial court to consider setting attorney's fees for the appellee's attorney, Appendix, infra, pp. 1a-5a.

The appellant filed his Application for Permission to Appeal to the Supreme Court of Tennessee on September 9, 1985 and his Amendment to Application for Permission to Appeal on September 11, 1985. The Supreme Court of Tennessee denied his application by order filed October 28, 1985. The Court of Appeals Decree was filed on August 14, 1985, the date of its opinion, Appendix, infra, pp. 20a-21a. No Application for a rehearing was filed and the Notice of Appeal to this court was filed on November 15, 1985 in the Court of Appeals, Eastern Section, state of Tennessee.

b. Statute conferring jurisdiction

Jurisdiction of this court is invoked pursuant to 28 U.S.C., Sec. 1257 (1) and

(2), this being an appeal to determine whether federal law preempts state law on the question of support from Veterans' benefits and to determine whether T.C.A., Secs. 36-5-101, 36-5-103, and 36-5-104 are repugnant to the Constitution of the United States of America insofar as they give the state courts jurisdiction over veterans and their disability benefits received from the federal government.

c. Laws which the case involves

1. Constitutional provision--Article VI, Clause 2, Constitution of the United States of America:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. Federal statutes

(a) 38 U.S.C., Sec. 211 (a):

On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title; the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

(b) 38 U.S.C., Sec. 3101 (a), first sentence:

Payments of benefits due or to become due under any law administered by the Veterans' Administration shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.

(c) 38 U.S.C., Sec. 3107:

(a) All or any part of the compensation, pension, or emergency officers' retirement pay payable on account of any veteran may--

(1) If the veteran is being furnished hospital treatment,

institutional, or domiciliary care by the United States, or any political subdivision thereof, be apportioned on behalf of the veteran's spouse, children, or dependent parents; and

(2) if the veteran is not living with the veteran's spouse, or if the veteran's children are not in the custody of the veteran be apportioned as may be prescribed by the Administrator.

(b) Where any of the children of a deceased (sic) veteran are not in the custody of the veteran's surviving spouse, the pension, compensation, or dependency and indemnity compensation otherwise payable to the surviving spouse, may be apportioned as prescribed by the Administrator.

(c) If a veteran is not living with the veteran's spouse, or if any of the veteran's children are not in the custody of the veteran any subsistence allowance payable to the veteran under chapter 31 of this title or that portion of the educational assistance allowance payable on account of dependents under chapter 34 of this title may be apportioned as may be prescribed by the Administrator.

3. State statutes

(a) T.C.A., Sec. 36-5-101 (a) - (c), and (e), Appendix, infra, pp. 28a-32a.

(b) T.C.A., Sec. 36-5-102:

36-5-102. Portion of spouse's

estate decreed to spouse entitled to alimony or support--In such case, the court may decree to the spouse who is entitled to such alimony or child support such part of the other spouse's real and personal estate as it may think proper. In doing so, the court may have reference and look to the property which either spouse received by the other at the time of the marriage, or afterwards, as well as to the separate property secured to either by marriage contract or otherwise.

(c) T.C.A., Sec. 36-5-103: Appendix, infra, pp. 32a-35a.

(d) T.C.A., Sec. 36-5-104:

36-5-104. Failure to comply with child support order -- Criminal sanctions.--(a) When any person, ordered to provide support and maintenance for a minor child or children, shall fail to comply with the order or decree, such person may, in the discretion of the court, be punished by imprisonment in the county workhouse or county jail for a period not to exceed six (6) months.

(b) No arrest warrant shall issue for the violation of any court order of support if such violation occurred during a period of time in which the obligor was incarcerated in any penal institution and was otherwise unable to comply with the order.

d. Statement of the case

The facts of the case are undisput-

ed. The appellant is a permanently and totally disabled Vietnam veteran, unable to secure gainful employment. He is a triple amputee and lost his right eye to enemy action (TR 27), and receives no money except \$281.00 in Social Security benefits, \$1,211.00 in Veterans' disability benefits, \$90.00 in Veterans' dependents benefits and \$1,806.00 under the "o" and "p" rates provided by the Veterans' Benefits Act (TR 28).

After his disability and on March 4, 1973 Mr. and Mrs. Rose were married and had two children, ages six and nine at the time the Complaint for Divorce was filed (TR 2).

The Final Decree of Divorce ordering the appellant to pay \$800.00 per month for child support was entered on the 25th day of October 1983 (TR 8, 10). The decree was not appealed from and became final on November 25, 1983.

In response to a Petition for Contempt filed against him, the appellant assumed the role of Counter Petitioner and sued

the state alleging that any laws of this state "which vest or attempt to vest jurisdiction in this Honorable Court over monies received or items purchased by the Counter-Petitioner from monies received from the Social Security Administration and the Veterans' Administration 'do 'major damage' to clear and substantial federal interests,' . . . and accordingly, violate the Supremacy Clause, U. S. Const., Art. VI, Cl. 2, and are null and void insofar as they attempt to overrule the United States Constitution," (TR 28), and he further alleged that the Director of the Veterans Administration has exclusive jurisdiction over Veterans benefits (TR 28-29).

The trial court held on May 9, 1984 that the appellant could make the state a party to the action to contest the jurisdiction of the court, but held further that the court was of the opinion that its orders were valid and must be complied with until it or some other court found it to be

without jurisdiction in the matter, Appendix, infra, pp. 11a-12a.

The state filed a Motion for Summary Judgment and on October 8, 1984 the trial court entered judgment granting the state's motion and reaffirmed its order that the appellant pay the sum of \$800.00 per month as and for child support by order entered on October 29, 1984, Appendix, pp. 16a-19a.

The appellant timely filed his appeal to the Supreme Court of Tennessee and asked the Supreme Court to find whether "Tennessee law vesting or attempting to vest divorce courts with jurisdiction over veterans and their disability benefits violate the Constitution of the United States, or do 'major damage to clear and substantial federal interests,' *Hisquierdo v. Hisquierdo*, 439 U.S. 572, insofar as it pertains to child support?" Brief of Appellant to the Supreme Court of Tennessee, p. 1.

The Supreme Court, on motion of the appellee, transferred the case to the Court

of Appeals, Eastern Section of Tennessee, at Knoxville, who, after considering the brief filed with the Supreme Court and transferred to the Court of Appeals and after oral argument held that there was no major damage to any substantial federal interests in this controversy, Appendix, infra, pp. 1a-5a. The Supreme Court denied appellant's Application for Permission to Appeal after the question had been restated in the appellant's Application as follows: "Do Tennessee courts have jurisdiction over veterans and their disability benefits to order child support, or is that jurisdiction vested exclusively in the Director of the Veterans Administration?" p. 2, Application for Permission to Appeal to the Supreme Court of Tennessee. The Supreme Court filed its order denying Application for Permission to Appeal on October 28, 1985.

REASONS FOR PLENARY CONSIDERATION

1. The United States Supreme Court should enforce the law of the land.

Prior to this case, at least eight states had addressed the issue of whether the states have jurisdiction over veterans and their federal benefits in determining the amount of child support to be awarded upon spousal separation. The states were evenly divided.

Oklahoma, Meadows v. Meadows, 619 P. 2d 598 (Okla. 1980), Massachusetts, Cohen v. Murphy, 366 Mass. 144, 330 N. E. 2d 473, 77 A. L. R. 3d 1310 (1970), Wisconsin, In re Gardner, 220 Wisc. 493, 264 N. W. 643 (1936), Washington, Pishue v. Pishue, 32 Wash. 2d 750, 203 P. 2d 1070 (1949) and California, Gaskins v. Security-First National Bank of Los Angeles, 30 Cal. App. 2d 409, 86 P. 2d 681 (1939), all correctly held that child support is not a debt within the meaning of the Veterans Benefits

Act and that such money was intended by Congress for the support of the veteran and his dependents. They then went beyond their jurisdiction and ordered child support payments to be made from veterans benefits by ignoring the express statement of Congress that the Administrator of the Veterans Administration alone has jurisdiction to apportion veterans benefits among dependents, 38 U. S. C., Sec. 3107 (a) (2).

Texas, *Ex parte Burson*, 615 S. W. 2d 192 (Tex. 1980), Idaho, *In re Irish*, 9 P. 2d 502 (Ida. 1932), Illinois, *In re Paniewski*, 107 Ill. App. 3d 848, 63 Ill. Dec. 535, 483 N. E. 2d 466 (1982) and Arizona, *Rickman v. Rickman*, 605 P. 2d 909 (Ariz. App. 1980) have all declined to exercise jurisdiction over veterans and their benefits on the ground that it was the clear and stated intent of Congress that federal law controls questions of child support when it is to be paid from veterans benefits.

The Tennessee Court of Appeals, and the Supreme Court of Tennessee, in denying Appellant's Application for Permission to Appeal, have joined Tennessee to the ranks of those states which have held that 38 U. S. C., Secs. 211 (a), 3101 (a) and 3107 are not the law of the land and nonrecognition of those federal laws does not violate the Supremacy Clause of the Constitution of the United States.

Accordingly, this court should note probable jurisdiction to determine whether the presumption that Congress does not intend to interfere with state domestic relations law, *Ray v. Atlantic Richfield Corporation*, 535 U. S. 151, 98 S. Ct. 988, 55 L. Ed. 2d 179 (1978), is applicable to veterans and their benefits or whether the Administrator has exclusive jurisdiction over the subject matter as expressly stated by the Congress, 38 U. S. C., Sec. 211 (a).

2. This court should note probable Jurisdiction because the Congress by express language gave the Administrator of the Veterans Administration exclusive jurisdiction over veterans benefits and any attempt on the part of the states to intervene violates the Supremacy Clause of the United States Constitution and frustrates a federal purpose.

The appellant receives only \$281.00 per month from social security benefits and the amount of child support ordered by the trial court was \$800.00 per month; accordingly, he has abandoned the question of whether support may be ordered from social security benefits and asks the Supreme Court to determine only whether the trial court had jurisdiction to consider his veterans benefits, his only other source of revenues, in awarding support in excess of his social security benefits.

The appellant argued before the trial court, the court of appeals and the Tennessee

Supreme Court that state courts are without jurisdiction to order child support payments from such benefits because Congress has vested sole and exclusive jurisdiction over such benefits in the Administrator, 38 U. S. C., Secs. 211 (a), 3101 (a), and 3107, and failure to recognize federal law violates the Supremacy Clause of the Constitution of the United States.

The issue presented in this case is controlled by the reasoning of *McCarty v. McCarty*, 453 U. S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981) and *Hisquierdo v. Hisquierdo*, 439 U. S. 579, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979).

The issue decided in *McCarty* was "whether, upon dissolution of a marriage, federal law precludes a state court from dividing military nondisability retired pay pursuant to state community property laws," 439 U. S. 211, 101 S. Ct. 2730, and the issue decided by *Hisquierdo* was

whether the Railroad Retirement Act prohibits the states from allocating and dividing railroad retirement benefits between former spouses. In both cases, this court found that the express terms of federal law prohibited the state courts from exercising jurisdiction over the federal benefits at issue and held that the Supremacy Clause required nonrecognition of state law because the state courts were without jurisdiction over the subject matter.

Family law rests with the states, In re Burrus, 136 U. S. 586, 10 S. Ct. 850, 34 L. Ed. 500 (1890) and this court will not intervene unless failure to do so would "do 'major damage' to 'clear and substantial' federal interests," Hisquierdo v. Hisquierdo, 439 U. S. 581, 99 S. Ct. 808, United States v. Yazell, 382 U. S. 341, 352, 86 S. Ct. 500, 507, 15 L. Ed. 2d 404 (1966).

As in the Hisquierdo case the pertinent question is whether the states can deny

federal rights asserted by an individual or whether state interference "conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition." 439 U. S. 583, 99 S. Ct. 809.

While the language of the Veterans Benefits Act is somewhat different than the law regulating railroad retirement benefits, Congress has nevertheless expressly stated that it is for the Administrator, and him alone, to apportion veterans benefits. The railroad retirement law expressly states that those benefits are intended for the use of the recipient alone, 45 U. S. C., Sec. 231 d (c) (3). Veterans benefits are intended for the veteran and his beneficiaries, 38 U. S. C., Sec. 211 (a). The issue then, is whether the states can apportion the benefits or whether only the Administrator can apportion them.

The statute expressly states that the Administrator's decision on any question of law or fact is final and conclusive pertaining to benefits for the veteran and his dependents, 38 U. S. C. 211 (a). In the event the veteran does not have custody of his children, Congress stated that his benefits are to be apportioned "as may be prescribed by the Administrator." 38 U. S. C., Sec. 3107 (a) (2).

The logic used in Hisquierdo is applicable here. The states, if allowed to enforce their child support laws against a disabled veteran would "penalize one whom Congress has sought to protect. It thus causes the kind of injury to federal interests that the Supremacy Clause forbids. It is not the province of state courts to strike a balance different from the one Congress has struck." 439 U. S. 590, 99 S. Ct. 813.

Thus the reasoning of the trial court and the Tennessee Court of Appeals that it

does not matter where the appellant gets the money to pay his support, he either pays it or goes to jail frustrates the federal purpose to provide for the disabled veteran and his dependents as the Administrator deems proper.

While this court has not addressed the issue presented by this appeal, Texas and Illinois have correctly found that the Hisquierdo and McCarty opinions are controlling:

The Hisquierdo holding is determinative of the question presented here although our case involves disability compensation benefits from the Veterans' Administration rather than railroad retirement benefits. These benefits, like those provided by the Railroad Retirement Act, are not contractual. Congress may alter and even eliminate them at any time. Congress expressed strong intent in both statutes that the benefits were intended for the use of the recipient. A veteran may be entitled to any additional amount of compensation for a spouse, child, and/or dependent parent where the veteran is entitled to compensation based on a disability evaluation. 38 U. S. C. 315, 335.

However, upon divorce, this amount of additional compensation is eliminated. 38 U. S. C. A. 3012 (b) (2). This reduction was made here following the divorce.

Both statutes (the Railroad Retirement Act and the Veterans' Benefits Act) contain a strong prohibition against attachment and anticipation of the benefits. Section 231m of the Railroad Retirement Act provides in part that such payments shall not be subject to any "legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated. . . ." Section 3101 (a) of Title 38 provides in part that the disability compensation benefits shall not be assignable and "shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary," *Yates v. Mobile America Sales Corporation*, 591 S. W. 2d 453, 456 (Tex. 1979).

In *re Paniewski*, 107 Ill. App. 3d 848, 63 Ill. Dec. 535, 483 N. E. 2d 466 (1983), held that *McCarty* also applies to veterans disability benefits:

The basic purpose of that program is to provide relief from the impaired earning capacity of veterans disabled as the result of their military service. (H. R. Rep. No. 96-1155, July 2, 1980, 1980 U. S.

Code Cong. & Ad. News 3307, 3310 (hereinafter cited as H. R. Rep. No. 96-1155); see *State ex rel. Eastern State Hospital v. Beard* (Okla. 1979), 600 P. 2d 324). In furtherance of this purpose and to ensure the purchasing power of the disabled veteran, Congress historically has increased the compensation rates whenever there has been an appreciable increase in the cost-of-living index. (H. R. Rep. No. 96-1155, at 3311, 3316.), 438 N. E. 2d 466, 469.

Finally, *Ex parte Burson*, (1981 Tex.) 613 S. W. 2d 192, held that because veterans benefits are not assignable, they are not property and "the federal supremacy clause and congressional intent will not permit the frustration of a federal law which grants benefits as a gratuity." *Id.* at 196. Another Texas case, *Berg v. Berg* (C. A. Tex. 1950) 232 S. W. 2d 783, held that the trial court is without jurisdiction to enforce support provisions in a divorce decree which can only be paid from veterans benefits.

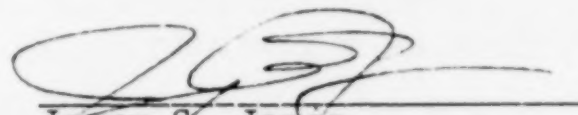
If the state courts are without jurisdiction to order child support from veterans benefits, it follows that they are also with-

out authority to order attorney's fees in this case.

3. Conclusion

For the foregoing reasons, this Honorable Court should note probable jurisdiction and hear this matter on the merits, or in the alternative, and in the event this court does not consider appeal the proper mode of review, appellant prays that the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U. S. C., Sec. 1257 (3).

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I did on this the 16th day of January 1986 serve three copies of this Jurisdictional Statement on counsel for appellees, Michael J. Davenport, Attorney for Barbara Ann McNeil Rose, 333 W. Walnut Street, Johnson City, Tennessee 37601 and Dianne Stamey, Attorney for the State of Tennessee, 450 James Robertson Parkway, Nashville, Tennessee 37219, by depositing them in the United States Mail, first class postage prepaid.


Jerry S. Jones

APPENDIX

FILED Aug. 14, 1985

JOHN A. PARKER, Clerk

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

Date of judgment is
same as filing date
of court's opinion.
(T.R.A.P. 38)

BARBARA ANN McNEIL ROSE) WASHINGTON LAW
Appellee) C.A. No. 150

-vs-

CHARLIE WAYNE ROSE) HON. JACK R.
Appellant) MUSICK, JUDGE

-vs-

THE STATE OF TENNESSEE) AFFIRMED AND
REMANDED

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O P I N I O N

James W. Parrott, P.J.

In this divorce action Charlie Wayne
Rose has appealed from the order of the cir-
cuit judge directing him to pay his two minor

children \$800 per month child support. In the court below and in this court it is insisted that monies received from the Social Security Administration and the Veterans Administration are not subject to child support. Appellant is a disabled Vietnam veteran, having lost both legs, an arm, and an eye. He receives \$3500 a month from the Veterans Administration and Social Security. It is insisted the court was without jurisdiction and the order violates the Supremacy Clause of the U.S. Constitution, Article VI, Clause 2, and is null and void. Appellant further claims that the Director of the Veterans Administration has sole jurisdiction to fix any amount of child support and in this case has awarded \$90 per month as benefits to the two minor children. Appellant further contends that T.C.A. Sec. 26-2-11 (sic) exempts Veterans' and Social Security benefits from child support and asserts that T.C.A. Sec. 36-5-101 is unconstitutional. Since the constitutionality of a statute

has been challenged, the Attorney General has been made a party and filed a brief.

The United States Supreme Court has recognized that domestic relations is an area where state law should control. Hisquierdo v. Hisquierdo, 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed. 2d 1 (1979). It has also been held that state family law must not do major damage to clear and substantial federal interest (sic). McCarty v. McCarty, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981). It appears that congressional intent is that disability payments are to be used to support the beneficiary and his dependents. The majority of our courts have held that statutes exempting property from legal process in enforcement of claims are not applicable to claims for alimony and child support. Meadows v. Meadows, 619 P. 2d 598 (Okla.1980). Our courts have reasoned that a person receiving Veterans Administration funds and Social Security payments should be protected from garnishment and

attachment for debts. Child support and alimony are not debts within the meaning of the statutes and -2- constitutional provisions. Alimony and child support are obligations. We do not see that there is any major damage to clear and substantial federal interest (sic) in allowing benefits to be used to meet family obligations. Child support is not subject to garnishment or execution but is enforceable by civil contempt. Thus child support is not that of a debt but of an obligation growing out of parental status and public policy.

For the reasons given, we affirm the circuit judge's order directing that \$800 per month be paid as child support. However, we remand the case to give the circuit judge an opportunity to modify his order so as to give the appellant credit or setoff of the \$90 per month paid by the Veterans Administration. Thus appellant's payments would be a total of \$800 and not \$890 as they are now.

Appellee has made a motion for attorney fees. This motion is remanded to the circuit court for the hearing of proof, if necessary, and the circuit judge to make a determination if the appellee's attorney is entitled to fees and if so, how much.

Let the decree be affirmed with costs taxed to the appellant.

/s/James W. Parrott
James W. Parrott, P.J.

CONCUR:

/s/ Herschel P. Franks
Herschel P. Franks, J.

/s/Samuel L. Lewis
Samuel L. Lewis, J.

FILED May 14, 1984

DON SQUIBB, Clerk

IN THE CIRCUIT COURT FOR WASHINGTON
COUNTY AT JONESBORO, TENNESSEE

BARBARA ANN McNEIL ROSE)

Petitioner,)

v.)

CHARLIE WAYNE ROSE,)

Respondent and
Counter-Petitioner,)

v.)

BARBARA ANN McNEIL ROSE)
and the GREAT STATE OF
TENNESSEE,)

Counter-Respondents.)

CIVIL ACTION NO.
4270

ORDER ON PETITION FOR CONTEMPT

This cause came on to be heard on the 9th day of May 1984 before the Honorable Jack R. Musick holding the Circuit Court for Washington County at Jonesboro, Tennessee on the Petition for Contempt, the Answer to the Petition for Contempt, statements of counsel, and the record as a whole from and after the entry of the final Decree of

Divorce, from all of which the Court is of the opinion and finds as follows:

1. That the parties were divorced by this Honorable Court by Decree entered on the 25th day of October, 1983, and that as a part of the said Decree the Defendant-Respondent was ordered to pay to the Plaintiff-Petitioner the sum of \$800.00 per month as child support for the support of the parties' two minor children.

2. For the month of April, the Respondent paid the sum of \$90.00 as and for support of the parties' minor children and the Social Security Administration paid the sum of \$94.00 which the Court has heretofore ordered should be paid in addition to the \$800.00 per month. That the Defendant is presently behind in his child support payments in the amount of \$710.00.

3. That the Defendant received the following monies in the month of April from which he could have paid the obligation ordered by this Honorable Court:

- a. Social Security benefits - \$281.00
- b. Veterans' Disability benefits -
\$1,211.00
- c. Veterans' Dependents benefits -
\$90.00
- d. Veterans' Aid and Attendance benefits - \$1,806.00 under the "o" and "p" rates provided by the Veterans' Benefits Act.

4. The Court is of the opinion that the Defendant may attack the Constitutionality of the support laws and accordingly may sue the State of Tennessee for such purposes; however, the Court is of the opinion that its orders are valid and must be complied with unless or until this or some higher Appellate Court finally determines the Constitutional issue.

5. The Court is of the opinion that the Defendant is in willful contempt of the orders of the Court, the Court having offered to allow the Defendant to proceed in this action to determine the Constitutional-

ity of the support laws of the great State of TENNESSEE, even if he pays the amounts in controversy.

6. The Court is of the opinion that a hearing is not necessary to determine that the Defendant is in willful contempt of the orders of the Court, the sworn answer of the Defendant-Respondent to the Answer to Petition for Contempt being sufficient to find that the Defendant is in willful contempt of the orders of the Court, and the Court reserves a hearing requested that there has been a material change in the circumstances of the parties until such time as all matters may be heard.

7. The Court is of the opinion that TCA Section 26-2-111, which exempts Social Security and Veterans' benefits does not apply to the instant controversy whether or not the Defendant is a citizen and resident of the State of Tennessee.

8. The Court is of the opinion that the Defendant-Respondent's motion in his

Answer to Petition for Contempt that the Court stay proceedings to enforce its judgment during the pendency of an appeal upon such reasonable terms as to bond or otherwise as it deems proper to secure the Plaintiff-Petitioner and the Defendant's offer to post a bond and/or to deposit money into the registry of the Court pending a final determination of the Constitutional question is not well taken and should be denied; however, the Court is of the opinion that the Respondent's motion to appeal should be granted pursuant to Rule 9 T.R.A.P. for the reasons stated at the hearing on the Petition for Contempt.

9. The Court is of the opinion that the Respondent should pay reasonable attorney's fees to Honorable Michael J. Davenport for the services which he rendered on behalf of the Petitioner in this cause in the amount of \$200.00.

IT IS ACCORDINGLY ORDERED, ADJUDGED and DECREED as follows:

a. That the State of Tennessee may be made a party to this action for the purpose of attacking the Constitutionality of the support laws of the State of Tennessee.

b. That the Defendant is in willful contempt of the orders of this Court and he is hereby ordered to be incarcerated immediately in the Washington County jail and to remain there until such time as he complies with the orders of the Court.

c. TCA Section 26-2-111 does not afford the Respondent any protection in the controversy whether or not he is a citizen and resident of the State of Tennessee.

d. The Respondent's motion to stay proceedings during the pendency of an appeal is hereby denied.

e. The Respondent is ordered to pay \$200.00 to Honorable Michael J. Davenport as and for his reasonable attorney's fees in representing the Petitioner in the above cause within thirty days.

f. The Respondent's motion for an

interlocutory appeal pursuant to rule nine, T.R.A.P., is hereby granted subject only to approval by the Appellate Courts.

g. The costs of this cause are taxed against the Respondent.

ENTER pursuant to Rule 58, TRCivP.

/s/Jack R. Musick
JACK R. MUSICK, Judge

APPROVED FOR ENTRY:

SAYLOR & DAVENPORT

By: /s/ Michael J. Davenport
Michael J. Davenport
Attorney for Petitioner

DENNY & JONES

By: /s/ Jerry S. Jones
Jerry S. Jones
Attorney for Respondent

FILED Oct. 8, 1984
A. Fleenor, Deputy Clerk

IN THE CIRCUIT COURT FOR WASHINGTON

COUNTY AT JONESBORO, TENNESSEE

BARBARA ANN McNEIL ROSE,)

Petitioner,)

vs.)

CHARLIE WAYNE ROSE,) CIVIL ACTION
NO. 4270

Respondent and
Counter Petitioner,)

vs.)

BARBARA ANN McNEIL ROSE)
and the GREAT STATE OF
TENNESSEE,)

Counter Respondents.)

ORDER

BE IT REMEMBERED that this cause came on to be heard on this the 4th day of September 1984, before the Honorable Jack R. Musick, Judge, holding the Circuit Court for Washington County, sitting at Elizabethton, Tennessee, upon the Petition for Contempt and Answer filed herein and Counter Petition of the Respondent, Charlie Wayne Rose, and Motion for Summary Judgment by

the Assistant Attorney General for the State of Tennessee, and the entire record from all of which the Court is of the opinion and finds that Tennessee Code Annotated Section 36-801 and Section 36-820 (now Sections 36-4-101, 36-4-103 and 36-5-101) are constitutional and that the Court has jurisdiction to order support payments to be made from Federal Disability Income Benefits, and for that reason the Motion for Summary Judgment is sustained.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED BY THE COURT that the State of Tennessee's Motion for Summary Judgment is sustained, and that Tennessee Code Annotated Section 36-801 and Section 36-820 are constitutional, and that the Court has jurisdiction to order support payments to be made from Federal Disability Income Benefits. All other matters are reserved, pending further Orders of the Court.

ENTER:

/s/Jack R. Musick

JUDGE JACK R. MUSICK

APPROVED FOR ENTRY:

SAYLOR & DAVENPORT

By: /s/Michael J. Davenport
Michael J. Davenport
Attorney for Petitioner
333 W. Walnut St.
Johnson City, TN 37601

DENNY & JONES

By: /s/Jerry S. Jones
Jerry S. Jones
Attorney for Respondent and
Counter Petitioner
1907 N. Roan St.
Johnson City, TN 37601

By: /s/Dianne Stamey
Dianne Stamey
Attorney for State of Tennessee
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37219

FILED Oct. 29, 1984
Don Squibb, Clerk

IN THE CIRCUIT COURT FOR WASHINGTON

COUNTY AT JONESBORO, TENNESSEE.

BARBARA ANN McNEIL ROSE,)
 Plaintiff,)
vs.) No. 4270
CHARLIE WAYNE ROSE,)
 Defendant.)

ORDER

BE IT REMEMBERED that this cause came on to be heard on the 8th day of October, 1984, before the Honorable Jack R. Musick, Judge, holding the Circuit Court for Washington County sitting at Johnson City, Tennessee, upon the Petition for Contempt and Answer and Counter Petition previously filed and the entire record, after all of which the Court is of the opinion and finds that the Parties have agreed that visitation with the two (2) minor children is to be modified so that the Defendant, Charlie Wayne Rose is to have visitation while school is in session every other weekend from Friday at 4:30 p.m. until

Sunday at 6:00 p.m. and on the alternate Fridays while school is in session the Defendant is to have visitation from 4:30 p.m. until 8:30 p.m. and when school is in vacation, the Defendant is to have visitation every other weekend from Saturday at 9:00 a.m. until Sunday at 6:00 p.m. and every Wednesday between the hours of 9:00 a.m. and 9:00 p.m. All previous orders of the Court concerning visitation are modified as set forth above.

The Court further finds that the Defendant's child support payments in the amount of \$800.00 per month are to continue as per the previous orders of the Court.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED by the Court that the previous orders of visitation are modified so as to show the Defendant Charlie Wayne Rose is to have visitation with the two (2) minor children when school is in session every other weekend from Friday at 4:30 p.m. until Sunday at 6:00 p.m. and that he is to have

visitation while school is in session on the other Fridays from 4:30 p.m. until 8:30 p.m. and when school is in vacation the Defendant is to have visitation privileges every other Saturday from 9:00 a.m. until Sunday at 6:00 p.m. and when school is in vacation he is to have visitation privileges every Wednesday between the hours 9:00 a.m. and 9:00 p.m.

IT IS FURTHER ORDERED, ADJUDGED and DECREED by the Court that the Defendant is to continue to pay the sum of \$800.00 per month as heretofore ordered pending the final appeals in this cause.

The costs of this cause are taxed equally to the Parties for which let execution issue if not sooner paid.

ENTER

/s/Jack R. Musick
JACK R. MUSICK, JUDGE

APPROVED FOR ENTRY:

SAYLOR & DAVENPORT

By: /s/Michael J. Davenport
Michael J. Davenport

333 W. Walnut St.
Johnson City, TN 37601

/s/Jerry S. Jones
Attorney for Defendant
409 E. Watauga Ave.
Johnson City, TN 37601

-20a-

Filed August 14, 1985
by John A. Parker, Clerk

TENNESSE COURT OF APPEALS

MAY TERM 1985

DECREE

BARBARA ANN McNEIL ROSE

(Appellee)

vs.

CHARLIE WAYNE ROSE

(Appellant)

vs.

THE STATE OF TENNESSEE

WASHINGTON LAW
No. 4270

AFFIRMED AND
REMANDED

This cause coming on to be heard upon a transcript of the record from Circuit Court of Washington County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the judgment of the Court below there is no error.

It is therefore ordered and adjudged by the Court that the Judgment of the Court below be in all things affirmed and that this case be and hereby is remanded to the Circuit Court of Washington County for

-21a-

entry and enforcement of its final order as here affirmed with recommendations, and for collection of the costs adjudged in the trial court, and for any further proceedings necessary consistent with the opinion of this Court, a copy of which shall accompany the procedendo upon the remand to the court below.

The costs of this appeal are adjudged in this Court against the defendant-appellant, Charlie Wayne Rose, and sureties (sic), Jerry S. Jones, Esq., Johnson City, Tenn., for which let execution issue.

Parrott, P.J.
Franks, J.
Lewis, J.

-22a-

FILED Oct. 28, 1985
JOHN A. PARKER, Clerk

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

CHARLIE WAYNE ROSE,)
)
 APPELLANT)

VS.) WASHINGTON LAW

BARBARA ANN McNEIL ROSE,)
)
 APPELLEE)

AND)

THE GREAT STATE OF)
TENNESSEE

O R D E R

On considering the application for
permission to appeal and briefs filed in this
case and the entire record, the application
of Charlie Wayne Rose is denied at cost of
the appellant.

PER CURIAM

-23a-

IN THE COURT OF APPEALS OF
TENNESSEE, EASTERN SECTION

transferred from
THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

Filed Nov. 15, 1985

JOHN A. PARKER, Clerk

CHARLIE WAYNE ROSE,	)	WASHINGTON LAW
	)	C.A. No. 150
Appellant,)	
	)	HON. JACK R. MUSICK,
vs.	)	JUDGE
)	
BARBARA ANN McNEIL	)	AFFIRMED AND REMANDED
ROSE, and THE GREAT)	
STATE OF TENNESSEE,	)	APPLICATION FOR PER-
	)	MISSION TO APPEAL TO
Appellees.	)	THE SUPREME COURT OF
	)	TENNESSEE denied
	)	October 28, 1985

NOTICE OF APPEAL

TO THE SUPREME COURT

OF THE UNITED STATES OF AMERICA

TO: All parties concerned

You are hereby notified that CHARLIE
WAYNE ROSE, a triple amputee, who received
the Bronze Star Medal, the Purple Heart,
Good Conduct Medal, the National Defense
Service Medal, three Vietnam Service Medals,

the Vietnam Gallantry Cross and other citations for his services to his country, and who was disabled as above stated by enemy action in the former Republic of Vietnam, the father of two young children, now appeals to the Supreme Court of the United States of America to find that the Final Judgment of the Eastern Section Court of Appeals, state of Tennessee, which was entered on August 14, 1985 and became final on October 28, 1985 when the Supreme Court of Tennessee denied his Application for Permission to Appeal, violates the Supremacy Clause, Article VI, Clause 2, Constitution of the United States of America, in that, if allowed to stand, the judgment will do "major damage to clear and substantial federal interests," *McCarty v. McCarty*, 453 U.S. 210, 220, 101 S.Ct. 2728, 2735, 69 L.Ed. 2d 589 (1981).

The Tennessee Court of Appeals, Eastern Section, held in effect that the state of Tennessee is not bound by the laws of

the Congress of the United States of America and being 38 U.S.C.A. Secs. 211, 3101 and 3107, and accordingly ordered that the trial judge had jurisdiction to consider the amount of veterans' benefits which the Appellant receives in setting an award for child support.

Specifically, that part of the Judgment appealed from is:

. . . Child support and alimony are not debts within the meaning of the statutes (38 U.S.C.A., Sec. 3101) and constitutional provisions. Alimony and child support are obligations. We do not see that there is any major damage to clear and substantial federal interests in allowing (the states to order veterans') benefits to be used to meet family obligations. Child support is not subject to garnishment or execution but is enforceable by civil contempt. Thus child support is not that of a debt but of an obligation growing out of parental status and (state) public policy.

For the reasons given, we affirm the circuit judge's order directing that \$800 per month (from veterans' benefits) be paid as child support. . . .

* * *

Appellee has made a motion for attorney fees. This motion is remanded to the circuit court for the hearing of proof, if necessary, and the circuit judge to make a determination if the appellee's attorney is entitled to fees and if so, how much.

Let the costs (be) taxed to the appellant. Opinion of the Court of Appeals, Eastern Section, state of Tennessee, No. 150, Rose v. Rose, pp. 2-3.

Stated another way, that part of the judgment appealed from is whether the Tennessee child support statute, T.C.A., Sec. 36-5-101, as interpreted by the Court of Appeals conflicts with federal law and the Supremacy Clause of the Constitution of the United States of America or whether Congress intended to yield to the states in all matters involving child support.

This appeal is taken under 28 U.S.C.A., Sec. 1257.

Respectfully Submitted,

/s/Charlie W. Rose

CHARLIE WAYNE ROSE

/s/ Jerry S. Jones
Jerry S. Jones

Attorney for Appellant
409 E. Watauga Ave.
Johnson City, TN 37601
(615) 926-2165

CERTIFICATE OF SERVICE

I hereby certify that I did on this the 15th day of November 1985 mail a true and exact copy of the foregoing Notice of Appeal to Hon. Michael J. Davenport, Attorney for Barbara Ann McNeil Rose, 333 W. Market St., Johnson City, TN 37601 and to Hon. Dianne Stamey, Assistant Attorney General for Hon. W. J. Michael Cody, Attorney General and Reporter for the State of Tennessee, 450 James Robertson Pky., Nashville, TN 37219.

/s/Jerry S. Jones
Jerry S. Jones

TENNESSEE CODE ANNOTATED

36-5-101. Decree for support of spouse and children--Modification--Delinquencies.--

(a)(1) Whether the marriage is dissolved absolutely, or a perpetual or temporary separation is decreed, the court may make an order and decree for the suitable support and maintenance of either spouse by the other spouse, or out of his or her property, and of the children, or any of them, by either spouse or out of such spouse's property, according to the nature of the case and the circumstances of the parties, the order or decree to remain in the court's control; and, on application of either party, the court may decree an increase or decrease of such allowance only upon a showing of a substantial and material change of circumstances. Any such modification of an allowance shall be made retroactively only upon a specific written finding that the obligor was unable to pay the full amount of such allowance through no intentional fault

of his or her own and that the facts of the case require such a modification retroactively in order to meet the ends of justice. The court shall set a specific amount which is due in each month to be paid in one (1) or more payments as the court directs. Unless the court finds otherwise, each order made under this section shall contain the current address of the parties. Unless the court specifically orders otherwise, any order which provides for the support of two (2) or more persons shall be deemed prorated in equal shares among such persons.

(2) Courts having jurisdiction of the subject-matter and of the parties are hereby expressly authorized to provide for the future support of a spouse and of the children, in proper cases, by fixing some definite amount or amounts to be paid in monthly, semimonthly, or weekly installments, or otherwise, as circumstances may warrant, and such awards, if not paid, may be enforced by any appropriate process of the court

having jurisdiction thereof, including levy of execution.

(b) In addition to the remedies provided in part 5 of this chapter but not as an alternative to those provisions and if a parent is more than thirty (30) days in arrears, the clerk of the court may, upon written application of the obligee parent, a guardian or custodian of the children, or the department of human services if the child or children are public charges, issue a summons or, in the discretion of the court, an attachment for such parent setting a date for appearance bond of not less than two hundred fifty dollars (\$250) and not more than twenty-five hundred dollars (\$2500). In addition, the court may at any time require an obligor parent to give security by bond with sufficient sureties approved by the court for payment of past, present, and future support due under the order of support. If the obligor parent thereafter fails to appear or fails without

good cause to comply with the order of support, such bonds may be forfeited and the proceeds therefrom paid to the court clerk and applied to the order of support.

(c) Notwithstanding any provision of this section to the contrary, the wife or other person to whom the custody of the child or children is awarded, shall be entitled to enforce the provisions of the court's order or decree concerning the suitable support and maintenance of such child or children in the appropriate court of any county in this state in which such child or children reside, if service of process is effectuated upon the obligor within the state. Provided, however, jurisdiction to modify or alter such order or decree shall remain in the exclusive control of the court which issued such order or decree.

(e) In making its determination concerning the amount of support of any minor child or children of the parties, the court shall consider all relevant factors, in-

cluding:

- (1) The age, physical, mental and emotional condition of each child;
- (2) The educational needs of each child and the educational advantages each child had available at the time the circumstances requiring a court order for his or her support arose;
- (3) The earning capacity, obligations and needs, and financial resources of each parent;
- (4) The contributions, monetary and non-monetary, of each party to the well-being of the children;
- (5) The standard of living each child has enjoyed during the marriage; and
- (6) Such other factors as are necessary to consider the equities for the parents and children.

36-5-103. Enforcement of decree for alimony and child support.--(a) In addition to the remedies in part 5 of this chapter

the court shall enforce its orders and decrees by requiring the obligor to post a bond or give sufficient personal surety under Sec. 36-5-101(b) to secure past, present, and future support, unless the court finds that the payment record of the obligor parent, the availability of other remedies and other relevant factors make the bond or surety unnecessary. The court may enforce its orders and decrees by sequestering the rents and profits of the real estate of the obligor against whom such order or decree was issued, if he has any, and his personal estate and choses in action, and by appointing a receiver thereof, and from time to time causing the same to be applied to the use of the obligee and the children, or by such other lawful means the court deems necessary to assure compliance with its orders, including but not limited to the imposition of a lien against the real and personal property of the obligor.

(b) The spouse or other person to whom the custody of the child or children is awarded, shall be entitled to enforce the provisions of the court's orders or decrees concerning the support of such child or children, and to recover judgments for defaults in the payments directed and to obtain execution thereon and otherwise enforce payment thereof, all on behalf of the child or children in either the court which issued such order or decree or in the appropriate court of any county in this state in which such child or children reside, provided such court shall have divorce jurisdiction, if service of process is effectuated upon the obligor within this state. Provided, however, jurisdiction to modify or alter such order or decree shall remain in the exclusive control of the court which issued such order or decree.

(c) The plaintiff spouse may recover from the defendant spouse, and the spouse

or other person to whom the custody of the child, or children, is awarded may recover from the other spouse reasonable attorney fees incurred in enforcing any decree for alimony and/or child support, or in regard to any suit or action concerning the adjudication of the custody or the change of custody of any child, or children, of the parties, both upon the original divorce hearing and at any subsequent hearing, which fees may be fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion of such court.

MOTION

2

Supreme Court, U.S.

FILED

APR 2 1986

JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1206

In The
Supreme Court of the United States

October Term, 1985

CHARLIE WAYNE ROSE

Appellant,

VS.

BARBARA ANN McNEIL ROSE

AND

THE STATE OF TENNESSEE

Appellees.

**ON APPEAL FROM THE COURT OF APPEALS
OF TENNESSEE, EASTERN SECTION
AT KNOXVILLE**

MOTION TO DISMISS OR AFFIRM

W. J. MICHAEL CODY
Attorney General of Tennessee
Counsel of Record

DIANNE STAMEY
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219-5025
(615) 741-6420

Counsel for Appellee
State of Tennessee

QUESTION PRESENTED FOR REVIEW

Whether state courts have jurisdiction to order child support payments from veterans' disability benefits.

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No. 85-1206

—o—
In The
Supreme Court of the United States
October Term, 1985
—o—

CHARLIE WAYNE ROSE

Appellant,

VS.

BARBARA ANN McNEIL ROSE

AND

THE STATE OF TENNESSEE

Appellees.

—o—
**ON APPEAL FROM THE COURT OF APPEALS
OF TENNESSEE, EASTERN SECTION
AT KNOXVILLE**
—o—

—o—
MOTION TO DISMISS OR AFFIRM
—o—

I. NATURE OF THE CASE**A. Proceedings Below**

This appeal arises from a petition for contempt filed in the Circuit Court for Washington County, Tennessee on or about April 18, 1984, by the appellee Barbara Ann McNeil Rose against the appellant, Charlie Wayne Rose, for failure to pay child support. The appellant had been ordered to pay \$800.00 per month child support for the par-

ties' two minor children in the final decree of divorce awarded to appellee, Barbara Ann McNeil Rose.

The appellant filed an answer and countercomplaint alleging that the trial court lacked jurisdiction to order him to pay child support. The appellant asserted that his sole source of income was from social security benefits and veterans' disability benefits and therefore, the Supremacy Clause barred the trial court from ordering child support to be paid from these federal benefits. The appellant also asserted that T.C.A. § 36-5-101 (formerly T.C.A. § 36-801) was unconstitutional insofar as it vested jurisdiction in the trial court to consider the appellant's income from disability benefits in setting the amount of child support. The appellee, State of Tennessee, was made a party to this action to defend the constitutionality of the state statute.

The appellee State of Tennessee filed a motion for summary judgment asserting that T.C.A. § 36-5-101 was not unconstitutional and that the trial court had jurisdiction to order support payments from federal disability income. The trial court granted the appellee State of Tennessee's motion for summary judgment and held that it had jurisdiction to order appellant to pay child support.

The appellant appealed the decision of the trial court to the Tennessee Court of Appeals. On August 14, 1985, the Tennessee Court of Appeals upheld the constitutionality of T.C.A. § 36-5-101 and held that the trial court had jurisdiction to order appellant to make support payments from federal disability income. Permission to appeal was denied by the Supreme Court of Tennessee on October 28, 1985.

B. Statement of the Facts

The appellant is a permanently and totally disabled Vietnam veteran. Due to his services in the Vietnam conflict, he lost both legs, his right arm below the elbow and his right eye. The appellant's monthly income consists solely of \$281.00 in social security benefits, \$1,211.00 in veterans' disability benefits, \$90.00 in veterans' dependents benefits and \$1,806.00 under the "O" and "P" rates provided by the Veterans' Benefits Act.

The appellant and the appellee Barbara Ann McNeil Rose were married after his disability on March 4, 1973. Mr. and Mrs. Rose had two children who were six and nine years old at the time the complaint for divorce was filed in 1983.

The final decree of divorce was entered on October 25, 1983. This decree ordered the appellant to pay \$800.00 per month child support. This decree was not appealed by either party.

II. ARGUMENT

A. THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The appellee, Charlie Wayne Rose, asserts that T.C.A. § 36-5-101 is unconstitutional as violative of the Supremacy Clause of the United States Constitution to the extent it gives a trial court jurisdiction over money received from the Veterans' Administration. The appellee State of Tennessee respectfully submits that T.C.A. § 36-5-101 is constitutional and does not do major damage to

clear and substantial federal interests. Therefore, this appeal should be dismissed since the question presented does not present a substantial federal question.

A trial court has jurisdiction under T.C.A. § 36-5-101 to order support payments for a spouse or children. When determining the amount of support payments, T.C.A. § 36-5-101 provides for the consideration by the trial court of various factors including earning capacities, obligations, needs, education and training, age, physical and mental condition and such other factors as are necessary to consider the equities.

This Court has recognized that domestic relations is an area where state law should control. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979). Thus, state family law "must do 'major damage' to 'clear and substantial' federal interests" before the Supremacy Clause will override the state law. 439 U.S. at 581, 99 S.Ct. at 808.

The majority of courts are in agreement with the Tennessee Court of Appeals and have held that statutes exempting property from legal process in enforcement of claims are not applicable to claims for alimony or child support. *Operating Engineers v. Zamborsky*, 650 F.2d 196 (9th Cir. 1981) (ERISA); *Cartledge v. Miller*, 457 F.Supp. 1146 (S.D. N.Y. 1978) (ERISA); *Parker v. Parker*, 484 A.2d 168 (Pa. Super. 1984) (VA Benefits); *Cardenas v. Cardenas*, 478 A.2d 968 (R.I. 1984) (Workers' Comp.); *Baker v. Baker*, 421 A.2d 998 (N.H. 1980) (Military Retirement Pay); *Meadows v. Meadows*, 619 P.2d 598 (Okla. 1980) (Social Security Disability); *Western Electric Company v. Traphagen*, 400 A.2d 66 (N.J. 1979) (ERISA);

Cohen v. Murphy, 330 N.E.2d 473 (Mass. 1975) (VA Benefits); *Pishue v. Pishue*, 203 P.2d 1070 (Wash. 1949) (VA Benefits); *Hannah v. Hannah*, 191 Ga. 134, 11 S.E.2d 779 (1940) (VA Benefits); *Paxton v. Paxton*, 420 N.E.2d 1346 (Ind. App. 1981) (Firemen's Retirement); *State v. Reed*, 5 Conn. Cir. 69, 241 A.2d 875 (1967) (Workers' Comp.); *Dillard v. Dillard*, 341 S.W.2d 668 (Tex. Civ. App. 1960) (VA Benefits); *Gaskins v. Security First National Bank of L.A.*, 30 Cal. App. 2d 409, 86 P.2d 681 (1939) (VA Benefits).

The courts have reasoned that the obligation to support dependents is not a debt in the usual sense as intended by Congress when it enacted the exemptions. The exemption contained in 38 U.S.C. § 3101(a) was enacted in order that the beneficiary would be able to support himself and his family and to insure the public against pauperism of the recipient and his dependents. *State ex rel. Eastern State Hospital v. Beard*, 600 P.2d 324 (Okla. 1979); *State v. Monaco*, 81 N.J. Super. 448, 195 A.2d 810 (1963). There is no "major damage to clear and substantial federal interests" in allowing benefits to be used to meet familial obligations. *Western Electric Company v. Traphagen*, *supra*.

The Court has recognized that the obligation of child support is distinguishable from the obligation of community property. *Wissner v. Wissner*, 338 U.S. 655, 70 S.Ct. 398, 94 L.Ed. 424 (1950). Thus, the Court in *Wissner* recognized that there was a moral obligation to support spouse and children which would justify an exception to the exemption provisions. 338 U.S. at 660, 70 S.Ct. at 400. This exception for a family's need for support was also

recognized by the Court in *Hisquierdo v. Hisquierdo*, *supra* at 587, 588, 99 S.Ct. at 811. Thus, the question presented in this appeal is clearly distinguishable from the decisions cited by the appellant which dealt with the question of community property rather than child support. *Ex Parte Burson*, 615 S.W.2d 192 (Tex. 1981); *In Re Marriage of Hapaniewski*, 107 Ill. App.3d 848, 63 Ill. Dec. 535, 438 N.E.2d 466 (1982); *Rickman v. Rickman*, 605 P.2d 909 (Ariz. App. 1980).

Therefore, although the exemption provided in 38 U.S.C. § 3101(a) may apply to community property awards, it is well settled that this exemption does not apply to child support. Providing for the support of dependents does not violate the intent of Congress in enacting 38 U.S.C. § 3101(a). There is no major damage to clear and substantial federal interests by T.C.A. § 36-5-101 giving the courts jurisdiction to consider veterans' benefits in setting the amount of child support. Thus, this appeal does not present a substantial federal question and should be dismissed.

B. THIS APPEAL IS SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

The appellant, Charlie Wayne Rose, asserts that T.C.A. § 36-5-101 is unconstitutional because 38 U.S.C. § 3107 gives the Administrator of the Veterans' Administration exclusive jurisdiction to determine the amount of child support to be paid out of veterans' benefits. The appellee State of Tennessee respectfully submits that this question is so unsubstantial as not to need further argument.

The Administrator of the Veterans' Administration has the authority under 38 U.S.C. § 3107 to apportion benefits payable to a veteran if the veteran is not living with the veteran's spouse or if the veteran's children are not in the veteran's custody. However, this statute does not give the Administrator exclusive jurisdiction to apportion benefits. This statute simply provides that a veteran's benefits may "be apportioned as may be prescribed by the Administrator." 38 U.S.C. § 3107(a)(2). Clearly by the use of the term "may" as opposed to "shall", Congress did not intend that only the Administrator could determine the amount of child support a veteran must pay.

Domestic relations is an area where state law should control. *Hisquierdo v. Hicquierdo*, *supra*. Thus, the court will not interfere with state family law unless there is "major damage to clear and substantial federal interests." 439 U.S. at 581, 99 S.Ct. at 808. As argued above, the majority of courts have held that there is no major damage to clear and substantial federal interests by allowing a trial court to consider veterans' benefits when setting the amount of child support. Further, there is no violation of congressional intent in creating an exception to the exemption statute for the obligation of child support since Congress intended veterans' benefits to be used to support the veteran and his dependents.

The appellee State of Tennessee respectfully submits that there is also no violation of congressional intent by allowing a state trial court to set the amount of child support to be paid from veterans' benefits rather than the Administrator. By stating that benefits may be apportioned "as may be prescribed by the Administrator", Congress has not

established a clear and substantial federal interest in the apportionment of benefits. 38 U.S.C. § 3107(a)(2). Since this is not a case where the Administrator has made a finding of fact or law, there is no major damage to clear and substantial federal interests by allowing state courts to determine the amount of child support to be paid by a veteran. Thus, the question presented is so unsubstantial as not to require further argument.

III. CONCLUSION

For the reasons stated above, the appellee State of Tennessee respectfully submits that this appeal should be dismissed, or in the alternative the judgment by the Tennessee Court of Appeals should be affirmed, on the grounds that the question presented for review does not present a substantial federal question and is so unsubstantial as not to need further argument.

Respectfully submitted,

W. J. MICHAEL CODY
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Counsel of Record

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State of Tennessee

MOTION

Supreme Court, U.S.
FILED

APR 4 1986

JOSEPH F. SPANIOL, JR.
CLERK

85-1202 (13)

Motion

LPP

NUMBER 85-1206

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CHARLIE WAYNE ROSE,

APPELLANT,

VS.

BARBARA ANN McNEIL ROSE AND
THE STATE OF TENNESSEE,

APPELLEES.

ON APPEAL FROM THE COURT OF APPEALS,
EASTERN SECTION OF TENNESSEE,
AT KNOXVILLE.

MOTION TO DISPENSE OF PRINTING OF MOTION

BARBARA ANN McNEIL ROSE, PRO SE
Route 11, Box 243
Greeneville, Tennessee 37743

HON. JERRY S. JONES
ATTORNEY FOR CHARLIE WAYNE ROSE

HON. DIANE STAMEY
ATTORNEY FOR THE STATE OF TENNESSEE

MOTION TO DISPENSE OF PRINTING OF MOTION

Comes Barbara Ann McNeil Rose, the Appellee herein, to respectfully move the Court for an Order to dispense with the requirement that the Appellee's Motion to Dismiss be printed and permitting the Appellee to file her Motion to Dismiss in typewritten form pursuant to Rule 47 of the Court.

The grounds for the motion are that the Appellee is financially unable to afford and bear the cost and expense of printing said Motion.

The Appellee has attached hereto an affidavit setting forth facts to show that she comes within the requirements of law to proceed in forma pauperis.

For the foregoing reasons, the Appellee submits that the Court should make and enter an Order dispensing with the printing of the Appellee's Motion to Dismiss, and permitting the Appellee to file a Motion in typewritten form.

Barbara Ann McNeil Rose
BARBARA ANN McNEIL ROSE
APPELLEE
Route 11, Box 243
Greeneville, Tennessee 37743
(615) 234-0515

CERTIFICATE OF SERVICE

4 I hereby certify that I did, on this the
day of April, 1986, mail a true and exact
copy of the foregoing Motion to Dispense of
Printing of Motion to the Hon. Jerry S. Jones,
Attorney for Charlie Wayne Rose, Appellant, 409
East Watauga Avenue, Johnson City, Tennessee
37601, and to the Hon. Diane Stamey, Assistant
Attorney General for Hon. W. J. Michael Cody,
Attorney General and Reporter for the State of
Tennessee, 450 James Robertson Parkway, Nashville,
Tennessee 37219.

Barbara Ann McNeil Rose
BARBARA ANN McNEIL ROSE
APPELLEE

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CHARLIE WAYNE ROSE,)
)
 Appellant,)
)
 vs.)
)
 BARBARA ANN McNEIL ROSE,)
)
 Appellee.)

NO. 85-1206

AFFIDAVIT OF BARBARA ANN McNEIL ROSE

STATE OF TENNESSEE)
)
 COUNTY OF WASHINGTON)

BARBARA ANN McNEIL ROSE, after being duly
sworn, deposes as follows:

1. She is the Appellee in the above styled
cause, and makes this Affidavit in support of
her Motion to Dispense with the requirement of
printing of the Motion to Dismiss.

2. The Affiant is unable, because of her
financial situation, to pay the fees and costs

of printing, in that her total income per month, including child support of \$400.00, is \$ 900⁰⁰, and her total expenses per month are \$ 900⁰⁰.

3. That she has no other assets or funds with which to pay the cost of printing and still be able to provide the necessities of life for her and her two children.

Barbara Ann McNeil Rose
BARBARA ANN MCNEIL ROSE

SUBSCRIBED AND SWORN TO before me, this the 4th day of April, 1986.

Elizabeth S. Clark
NOTARY PUBLIC

My Commission Expires:

7-27-87

AMICUS CURIAE

BRIEF

(3)
No. 85-1206

Supreme Court, U.S.

FILED

JUN 10 1985

JOSEPH F. SPANIOLO, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

CHARLIE WAYNE ROSE, APPELLANT

v.

**BARBARA ANN McNEIL ROSE AND
STATE OF TENNESSEE**

**ON APPEAL FROM THE COURT OF APPEALS
OF TENNESSEE, EASTERN DIVISION**

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE**

CHARLES FRIED

Solicitor General

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16pp

QUESTION PRESENTED

Whether the Supremacy Clause (U.S. Const. Art. VI, Cl. 2) deprives a state court of jurisdiction to order child support payments based on a veteran's federal military disability benefits.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1206

CHARLIE WAYNE ROSE, APPELLANT

v.

BARBARA ANN McNEIL ROSE AND
STATE OF TENNESSEE

ON APPEAL FROM THE COURT OF APPEALS
OF TENNESSEE, EASTERN DIVISION

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this divorce proceeding, the Tennessee state courts have ordered appellant, a totally disabled Vietnam veteran whose income is derived solely from Veterans and Social Security disability benefits, to pay \$800 per month for the support of his two minor children. Appellant challenges the decisions below (see J.S. i, 16) insofar as they hold that the Tennes-

see state courts have jurisdiction under Tennessee law to order child support payments from federal veterans disability benefits, despite federal law vesting exclusive jurisdiction over veterans benefits in the Administrator of the Veterans Administration.¹

While this Court has recognized that, in general, domestic relations is an area where state law should control, it has held that the Supremacy Clause is violated when a state's construction of its family law does "major damage" to "clear and substantial" federal interests." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (quoting *United States v. Yazell*, 382 U.S. 341, 352 (1966)). This is such a case. Veterans disability benefits are awarded because of a legislative decision that the fair and efficient operation of the military requires adequate income for disabled veterans. In order to ensure such income, Congress specifically provided that veterans disability benefits are to be exempt from taxation and protected from attachment or garnishment (38 U.S.C. 3101). Congress further provided that any decision to apportion benefits to provide child support—*e.g.*, where "the veteran is not living with [his] spouse" or where his "children are not in [his] custody"—should be made by the Administrator of the Veterans Administration (38 U.S.C. (Supp. II) 3107(a)(2)). The United States has a substantial interest in main-

¹ This case falls within this Court's appellate jurisdiction under 28 U.S.C. 1257(2) because "the state court [held] the [Tennessee] statute applicable to [the instant] facts as against the contention that such an application is invalid on federal grounds." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 112-113 (6th ed. 1986) (citing *inter alia* *McCarty v. McCarty*, 453 U.S. 210, 219-220 n.12 (1981)). See J.S. App. 2a.

taining federal control over this important program, which is designed not only to provide for the disabled veteran but also to facilitate meeting the personnel needs of the armed forces.

ARGUMENT

1. A regular or reserve member of the United States armed forces who is unable, because of physical or mental disability, to continue serving in the military is entitled to disability benefits. (38 U.S.C. (& Supp. II) 310 *et seq.*)² Such benefits are funded by annual appropriations. Neither the service member nor the federal government makes any contributions for that purpose during the period of active service.³

Monthly disability payments to veterans are not an earned property right based on years of service, but depend upon personal injury or disease resulting in a service-connected disability. Both the language of the statute and its legislative history make it clear that veterans benefits are "gratuities and establish no vested rights in the recipients so that they may be

² Disability pensions have been provided to military veterans from the Revolutionary War period to the present. For a discussion of the disability retirement system. See *Dual Compensation Paid to Retired Uniformed Services' Personnel in Federal Civilian Positions: Hearing Before the Subcomm. on Investigations of the House Comm. on Post Office and Civil Service*, 95th Cong., 2d Sess. 18-20 (1978).

³ Military personnel, however, have been required since 1957 to contribute to the Social Security System. Pub. L. No. 84-881, § 402, 70 Stat. 870. See 42 U.S.C. (& Supp. II) 410(l) and (m). A service member who meets that Act's disability standards is entitled to Social Security disability benefits. Appellant does not challenge the decisions below insofar as they hold that his Social Security disability benefits may be used to pay child support. See J.S. 16.

withdrawn by Congress at any time and under such conditions as Congress may impose." *Milliken v. Gleason*, 332 F.2d 122, 123 (1st Cir. 1964); *De Rodulfa v. United States*, 461 F.2d 1240 (D.C. Cir.), cert. denied, 409 U.S. 949 (1972).⁴ Congress was concerned to ensure that these benefits be used solely for the support of the disabled veteran. In 38 U.S.C. 3101(a), therefore, Congress provided that disability benefits are not assignable "except to the extent specifically authorized by law," are exempt from taxation and the claims of creditors, and "shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." The courts have recognized the broad nature of this exemption in holding veterans disability benefits exempt from a variety of claims. *E.g.*, *Porter v. Aetna Casualty & Surety Co.*, 370 U.S. 159 (1962).

2. It has long been recognized that domestic relations law is generally within state control. As this Court stated in *In re Burrus*, 136 U.S. 586, 593-594 (1890), "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the law of the States and not to the laws of the United States." Even when it is alleged that state family law conflicts with a federal statute, this Court has limited its review under the Supremacy Clause to a determination of whether Congress "positively required by direct enactment" that state law be preempted. *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904). As the Court stated in *Hisquierdo*, 439 U.S. at 581

⁴ As one of those conditions, 38 U.S.C. 211(a) provides that the decision of the Administrator is final on "any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors."

(quoting *United States v. Yazell*, 382 U.S. 341, 352 (1966)), a "mere conflict in words is not sufficient. State family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden."

Nevertheless, this Court has on occasion held that the Supremacy Clause requires that federal law override state domestic relations laws. In *Hisquierdo*, the Court considered whether a federal statutory provision barring assignment, garnishment or attachment of railroad retirement benefits preempted a state court order awarding an interest in those benefits (considered community property under state law) as part of a property settlement in a divorce proceeding. In analyzing the anti-attachment provision of the Railroad Retirement Act of 1974, 45 U.S.C. (Supp. II) 231m, the Court noted (439 U.S. at 584) that it "pre-empts all state law that stands in its way." The Court pointed out that Congress, in allocating a specific sum for railroad retirement benefits, had provided the precise amount that it considered appropriate for the employee's retirement—an amount that was designed to encourage an eligible employee to retire. Reducing that amount by assigning part of it to a divorced spouse in a property settlement, the Court observed (439 U.S. at 585), would reduce the incentive to retire and thus frustrate the congressional objective.⁵ In the instant case, similarly, Congress has provided for fixed schedules of veterans disability benefits and has provided that such benefits are to be entirely exempt "from the claim of credi-

⁵ The Court noted that Congress had considered and rejected a proposal to provide a benefit for a divorced spouse (439 U.S. at 584-585).

tors" and from "attachment, levy, or seizure by or under any legal or equitable process whatever" (38 U.S.C. 3101(a)). Reducing the amount available to the veteran by awarding a portion of the benefit to others will leave the disabled veteran with an amount less than that which Congress deemed necessary for his support. "Any [such] automatic diminution * * * frustrates the congressional objective" (*Hisquierdo*, 439 U.S. at 585) of ensuring adequate support for veterans and will necessarily have an adverse effect on the military's personnel policies.

In *McCarty v. McCarty*, 453 U.S. 210 (1981), the Court considered the relationship of a federal statutory bar on attachment and a state court order treating military retirement pay as community property in a divorce settlement. Finding a conflict between the terms of the federal provisions and the community property right asserted, the Court analyzed the conflict to decide whether the application of community property principles threatened grave harm to "clear and substantial" federal interests (453 U.S. at 232). The Court concluded (453 U.S. 233) that the community property right asserted would reverse the priorities of the federal statute by "giving the ex-spouse an interest paramount to that of the surviving spouse and children of the service member," and hence would diminish the amount of the benefit that Congress had determined should go to the veteran alone. In addition, allowing community property rights to take precedence would diminish the value of retired pay as an inducement for enlistment or reenlistment and would lessen the incentive to retire, thus hindering the congressional objective of maintaining a youthful military (453 U.S. at 235). Similar considerations dictate the primacy of federal law in the instant case—the need to ensure adequate sup-

port for veterans and to maintain the incentives for military service that disability programs provide. Here, as in *McCarty*, "[s]tate courts are not free to reduce the amounts that Congress has determined are necessary for the retired member" (453 U.S. at 233).⁶

3. In both *Hisquierdo* (439 U.S. at 586-587) and *McCarty* (453 U.S. at 230-232), the Court found support for its conclusion in 1975 and 1977 amendments to the Social Security Act. In those amendments, Congress provided generally that federal benefits are subject to garnishment for child support and alimony, but excepted from the definition of alimony "transfer of property * * * in compliance with any community property settlement" (42 U.S.C. (& Supp. II) 659(a), 662(c)). Congress had thus focused specifically on community property claims, albeit in the garnishment context, and declined to permit them to "deflect[] other federal benefit programs from their intended goals." *Hisquierdo*, 439 U.S. 587; see *McCarty*, 453 U.S. at 230. The Court held that state law, as reflected in a property award in a divorce proceeding, could not override this congressional choice.

A similar analysis applies here, where the federal garnishment statute (42 U.S.C. (& Supp. II) 659)

⁶ Although *Hisquierdo* and *McCarty* are the Court's most recent decisions that have considered federal preemption of state family law, they are by no means the first. In *McCune v. Essig*, 199 U.S. 382 (1905), federal homestead law, which allowed a widow to establish title to federal land settled by her husband, overrode a state law that would have allowed the daughter to inherit her father's expectation that the title would issue to him. In three cases, survivorship rules in federal savings bond and military life insurance systems prevailed over state community property law. *Yiatchos v. Yiatchos*, 376 U.S. 306, 309 (1964); *Free v. Bland*, 369 U.S. 663 (1962); *Wissner v. Wissner*, 338 U.S. 655 (1950).

again provides guidance as to congressional intent. Although that statute permits garnishment for child support, it does so *only* with respect to "moneys (the entitlement to which is based upon remuneration for employment) * * * payable by * * * the United States," and excepts from the definition of such moneys "any payments by the Veterans' Administration as compensation for a service-connected disability" (42 U.S.C. (Supp. II) 662(f)(2)).⁷ Thus, as in *Hisquierdo* and *McCarty*, Congress has made its intention clear. "Congress, in adopting [Section 659], thought that a family's need for support could justify garnishment, even though it deflected other federal benefit programs from their intended goals" (*Hisquierdo*, 439 U.S. at 587). Yet in adopting Section 662(f), Congress made clear its intention that the veterans disability benefit program was one that should *not* be so deflected. As in those cases, state law governing divorce proceedings cannot prevail against this congressional choice.

4. That is not to say, of course, that Congress has ignored the interests of the dependents of disabled veterans. Instead, Congress has chosen to refer them to the Veterans Administration Administrator—an official who could be expected to be particularly sensitive to the need to accommodate military personnel concerns—for the adjudication of their claims. Thus, in 38 U.S.C. (Supp. II) 3107 Congress specifically provided for the apportionment of benefits by the Administrator:

⁷ Such compensation may, however, be garnished if paid to "a former member of the Armed Services who is in receipt of retired or retainer pay if such former member has waived a portion of his retired pay in order to receive such compensation" (42 U.S.C. (Supp. II) 662(f)(2)). Appellees do not claim that appellant is such a person.

(a) All or any part of the compensation, pension, or emergency officers' retirement pay payable on account of any veteran may—

* * * * *

(2) if the veteran is not living with the veteran's spouse, or if the veteran's children are not in the custody of the veteran, be apportioned as may be prescribed by the Administrator.

Implementing regulations promulgated by the Administrator provide for apportionment of all or any part of disability benefits "if the veteran's children are not residing with the veteran and the veteran is not reasonably discharging his or her responsibility for the spouse's or children's support." 38 C.F.R. 3.450.⁸

The statute and regulations clearly indicate that the decision to order any form of apportionment of veterans disability benefits is entirely within the discretion of the Administrator. Any attempt by a state court to usurp that authority directly conflicts with Congress's intent and impedes the objectives of the legislation.

5. Congress's intent to leave control over veterans disability benefits entirely in the hands of the

⁸ The relevant Manual provision (*Veterans Administration Manual M-21-1*, ¶ 26.01 (Aug. 1, 1979) (Adjudication Procedure)) states:

Apportionment of a competent veteran's benefits may be made only *upon receipt of a claim* therefor and evidence meeting the requirements of VAR 1451 (emphasis in original):

(1) To an estranged spouse and child or children in the spouse's custody.

(2) To a child or children [not living with] the veteran [and to whom the veteran is not reasonably contributing]; except that a claim for apportionment on their behalf should be invited when consistent with the equities.

Administrator is further confirmed by 38 U.S.C. 211(a), which provides that:

[t]he decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

It would be highly anomalous for Congress, while explicitly precluding judicial review of the Administrator's decisions in federal courts, to have left his determinations open to challenge in the state courts. It would be even more anomalous if Congress had, as the courts below concluded, left the state courts free to decide such matters in the first instance, without considering the Administrator's views at all. The only logical conclusion is that Congress intended that the state courts be deprived of jurisdiction to make any allocation of veterans disability benefits.

6. As appellant notes (J.S. 13-14), there is a conflict among the state courts as to whether veterans disability benefits may be considered and, if necessary, attached in making support awards in divorce proceedings. The Tennessee courts below followed such decisions as *Parker v. Parker*, 355 Pa. Super. 348, 484 A.2d 168 (1984); *Cohen v. Murphy*, 368 Mass. 144, 330 N.E.2d 473 (1975); *In re Gardner*, 220 Wis. 493, 264 N.W. 643 (1936); *Pishue v. Pishue*, 32 Wash. 2d 750, 203 P.2d 1070 (1949); and *Gaskins v. Security-First National Bank*, 30 Cal. App. 2d 409, 86 P.2d 681 (1939), in holding that the state courts may order support payments to be made from vet-

erans disability benefits. Recent decisions from other states, however, have held that state courts under the Supremacy Clause lack such jurisdiction over veterans disability payments. E.g., *In re Hapaniewski*, 107 Ill. App. 3d 848, 438 N.E.2d 466 (1982); *Rickman v. Rickman*, 124 Ariz. 507, 605 P.2d 909 (Ct. App. 1980); *Ex parte Burson*, 615 S.W.2d 192 (Tex. 1981), and *In re Irish*, 51 Idaho 604, 9 P.2d 501 (1932). Thus, the treatment of veterans disability benefits in divorce proceedings varies in different states. This conflict is ripe for resolution by this Court in order to establish uniformity in the treatment of veterans disability benefits, and the instant case provides an appropriate vehicle by which the conflict may be resolved.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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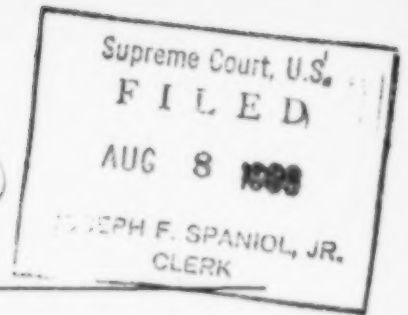
CHRISTINE R. WHITTAKER

Attorneys

JUNE 1986

JOINT APPENDIX

No. 85-1206



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CHARLIE WAYNE ROSE,

APPELLANT,

VS.

BARBARA ANN MCNEIL ROSE, and
THE STATE OF TENNESSEE

ON APPEAL FROM THE COURT OF APPEALS,
EASTERN SECTION OF TENNESSEE

JOINT APPENDIX

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NOTICE OF APPEAL FILED NOVEMBER 15, 1985
PROBABLE JURISDICTION NOTED JUNE 30, 1986

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OF RELEVANT DOCKET ENTRIES
AND OTHER EVENTS

IN THE CIRCUIT COURT
FOR WASHINGTON COUNTY
AT JONESBOROUGH, TENNESSEE

Rose v. Rose
and State of Tennessee

Civil Action No. 4270

DATE PROCEEDINGS

7/18/83--Complaint for Divorce filed
8/ 4/83--Answer to Complaint filed
10/25/83--Final Decree of Divorce filed
4/19/84--Petition for Contempt filed
5/ 9/84--Answer to Petition for Contempt
filed, suing state of Tennessee
and raising constitutional is-
sue
6/15/84--Motion for Summary Judgment
filed by State of Tennessee
10/ 8/84--Order granting State's Motion
for Summary Judgment filed
10/29/84--Final Decree resolving all is-
sues filed

IN THE APPEALS' COURTS

Rose v. Rose
and State of Tennessee

Court of Appeals Number
Washington Law C.A. No. 150

DATE PROCEEDINGS

11/ 2/84--Notice of Appeal filed in
Supreme Court of Tennessee
3/14/85--Order of Supreme Court
transferring case to Court
of Appeals filed
8/14/85--Opinion and Decree of the
Court of Appeals filed
9/ 9/85--Application for Permission
to Appeal to the Tennessee
Supreme Court filed
9/11/85--Amended Application for
Permission to Appeal filed
10/28/85--Order of Tennessee Supreme
Court denying Application
for Permission to Appeal filed
11/15/85--Notice of Appeal to the
United States Supreme Court
filed

RELEVANT OPINION

8/14/84--Opinion of The Tennessee
Court of Appeals, Rose v.
Rose and Tennessee, No. 150,
Washington Law, filed (J.S.
1a)

DECISION IN QUESTION

8/14/85--Decree of the Tennessee Court of Appeals (J.S. 20a); see also Order of Supreme Court, filed 10/28/85 denying Application for Permission to Appeal (J.S. 22a)

OTHER PARTS OF THE RECORD
TO BE BROUGHT TO THE COURT'S
ATTENTION

Order on Petition for Contempt (wherein trial court held preliminarily that it had jurisdiction), filed May 14, 1984 (J.S. 6a)

Order granting Tennessee's Motion for Summary Judgment (as to issue of jurisdiction and upholding Tennessee's support laws as they apply to the facts of this case, filed October 8, 1984 (J.S. 13a)

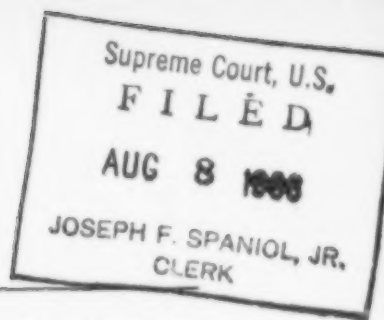
Final Order of trial court (making the case appealable) filed October 29, 1984 (J.S. 16a)

Order of Tennessee Supreme Court denying Appellant's Application for Permission to Appeal, filed October 28, 1985 (J.S. 22a)

Notice of Appeal to the United States Supreme Court, filed November 15, 1985 (J.S. 23a)

APPELLANT'S BRIEF

(5)
No. 85-1206



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CHARLIE WAYNE ROSE,

APPELLANT,

VS.

BARBARA ANN MCNEIL ROSE, AND
THE STATE OF TENNESSEE

ON APPEAL FROM THE COURT OF APPEALS,
EASTERN SECTION OF TENNESSEE

BRIEF FOR APPELLANT

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QUESTION PRESENTED

Whether the Supremacy Clause
(U.S. Const. Art. VI, Cl. 2) deprives
a State court of jurisdiction to
order child support payments based
on a veteran's federal military
disability benefits.

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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1985

No. 85-1206

CHARLIE WAYNE ROSE, APPELLANT

v.

BARBARA ANN MCNEIL ROSE AND
STATE OF TENNESSEE

ON APPEAL FROM THE
COURT OF APPEALS OF TENNESSEE,
EASTERN SECTION

BRIEF OF APPELLANT

OPINIONS AND JUDGMENTS BELOW

The judgment of the trial court was entered on October 19, 1984, is unreported and set forth in the Appendix to the Jurisdictional State-

ment, hereinafter abbreviated as J.S., App., pp. 16a-19a. Reference is also made to Judgment of the trial court sustaining Tennessee's motion for summary judgment filed on October 8, 1984, wherein the trial court found that none of Tennessee's support statutes as applied to this case violate the Constitution of the United States, J.S., App. pp. 13a-15a. The opinion of the Tennessee Court of Appeals is unreported, was decided by the Eastern Section, state of Tennessee on August 14, 1985 and bears Case No. 150, Washington Law, J.S. App. pp. 1a-5a. Application for Permission to Appeal to the Supreme Court of Tennessee was denied by Order of that court on October 28, 1985, J.S. App. 22a.

JURISDICTION

This court has jurisdiction over this appeal pursuant to 28 U. S.C., sec. 1257(2) because the State courts held that the Tennessee statutes were not invalid on federal grounds. The opinion and order of the Court of Appeals was August 14, 1985. The Order denying Application for Permission to Appeal to the Supreme Court of Tennessee was filed on October 28, 1985. The notice of appeal to this Court was filed on November 15, 1985 and is set out in full, J.S. App. pp. 23a-27a. This court noted probable jurisdiction on June 30, 1986.

LAWS WHICH THE CASE INVOLVES

1. Constitutional provision--

Article VI, Clause 2, Constitution of the United States of America (J.S. 5).

2. Federal Statutes

(a) Pub. L. No. 84-881, sec.

402 (a), 70 Stat. 870:

Sec. 402. (a) Section 210 of the Social Security Act is amended by adding at the end thereof the following new subsections:

"Service in the Uniformed Services

"(m) (1) Except as provided in paragraph (4), the term 'employment' shall, notwithstanding the provisions of subsection (a) of this section, include service performed after December 1956 by an individual as a member of a uniformed service on active duty; but such term shall not include any such service which is performed while on leave without pay.

* * *

"(4) (A) Paragraph

(1) of this subsection shall not apply in the case of any service, performed by an individual as a member of a uniformed service, which is creditable under section 4 of the Railroad Retirement Act of 1937. The Railroad Retirement Board shall notify the Secretary of Health, Education, and Welfare, as provided in section 4 (p) (2) of that Act, with respect to all such service which is so creditable.

(b) 38 U.S.C., sec. 211 (a)

(J.S. 5-6).

(c) 38 U.S.C., sec. 310:

Sec. 310. Basic entitlement

For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service

in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is the result of the veteran's own willful misconduct.

(d) 38 U.S.C., sec. 3101

(a), first sentence (J.S. 6).

(e) 38 U.S.C., sec. 3107

(J.S. 6-7).

(f) 42 U.S.C., sec. 659 (a):

Sec. 659. Enforcement of individual's legal obligations to provide child support or make alimony payments

(a) United States and District of Columbia to be subject to legal process

Notwithstanding any other provision of law (including section 407 of this title) effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the

District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments (Emphasis added).

(g) 42 U.S.C., sec. 662:

* * *

(b) The term "child support", (sic) when used in reference to the legal obligations of an individual to provide such support, means periodic payments of funds for the support and maintenance of a child or children with respect to which such individual has such an obligation, and (subject to and in accordance with State law) includes but is not limited to, payments to provide for health care, education, recreation, clothing, or to meet other specific needs

of such a child or children; such term also includes attorney's fees, interest, and court costs, when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction.

* * *

(e) The term "legal process" means any writ, order, summons, or other similar process in the nature of garnishment, which--

(1) is issued by (A) a court of competent jurisdiction within any State, territory, or possession of the United States, (B) a court of competent jurisdiction in any foreign country with which the United States has entered into an agreement which requires the United States to honor such process, or (C) an authorized official pursuant to an order of such a court of competent jurisdiction or pursuant to State or local law, and

(2) is directed to,

and the purpose of which is to compel, a governmental entity, which holds moneys which are otherwise payable to an individual, to make a payment from such moneys to another party in order to satisfy a legal obligation of such individual to provide child support or make alimony payments.

(f) Entitlement of an individual to any money shall be deemed to be "based upon remuneration for employment", if such money consists of--

(1) compensation paid or payable for personal services of such individual, whether such compensation is denominated as wages, salary, commission, bonus, pay, or otherwise, and includes but is not limited to, severance pay, sick pay, and incentive pay, but does not include awards for making suggestions, or

(2) periodic benefits (including a periodic benefit as defined in section 428(h)(3) of this title) or other payments to such individual under the insurance system established by subchapter II of this chapter or any other system or fund

established by the United States (as defined in subsection (a) of this section) which provides for the payment of pensions, retirement or retired pay, annuities, dependents' or survivors' benefits, or similar amounts payable on account of personal services performed by himself or any other individual (not including any payment as compensation for death under any Federal program, any payment under any Federal program established to provide "black lung" benefits, any payment by the Veterans' Administration as pension, or any payments by the Veterans' Administration as compensation for a service-connected disability or death, except any compensation paid by the Veterans' Administration to a former member of the Armed Forces who is in receipt of retired or retainer pay if such former member has waived a portion of his retired pay in order to receive such compensation), and does not consist of amounts paid, by way of reimbursement or otherwise, to such individual by his employment to defray expenses incurred by such individual in carrying out duties associated with his employment.

3. Tennessee Statutes

- (a) T.C.A., sec. 36-5-101
- (a) - (c) (J.S., App. 28a-32a).
- (b) T.C.A., sec. 36-5-102
(J.S. 7-8).
- (c) T.C.A., sec. 36-5-103
(J.S., App. 32a-35a).
- (d) T.C.A., sec. 36-5-104
(J.S. 8).

4. Federal Regulations

(a) 5 C.F.R., sec. 581.101

Purpose.

Section 659 of title 42 of the United States Code, as amended, provides that moneys, the entitlement to which is based upon remuneration for employment, due from, or payable by, the United States or the District of Columbia to any individual, shall be subject, as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement of such individual's legal obligations to provide child support and/or make alimony payments. The purpose of this part is to implement the objectives of section 659 as it pertains to the executive branch of the Government of the United States.

(b) 5 C.F.R., sec. 581.102

* * *

(d) "Child support" means periodic payments of funds for the support and maintenance of a child or children, and, subject to

and in accordance with State or local law, includes, but is not limited to, payments to provide for health care, education, recreation, clothing, or to meet other specific needs of such a child or children; the term also includes attorney's fees, interest, and court costs, if they are expressly made recoverable under a decree, order, or judgment issued in accordance with applicable State or local law by a court of competent jurisdiction.

* * *

(f) "Legal process" means any writ, order, summons, or other similar process in the nature of garnishment, which may include an attachment, writ of execution, or court ordered wage assignment, which--

(1) Is issued
by:

(i) A court of competent jurisdiction, including Indian tribal courts, within any State, territory, or possession of the United States, or the District of Columbia;

* * *

(2) Is directed to, and the purpose of which is to compel, a governmental entity, to make a payment from moneys otherwise payable to an individual, to another party to satisfy a legal obligation of the individual to provide child support and/or make alimony payments.

(g) "Legal obligation" means an obligation to pay alimony and/or child support which is enforceable under appropriate State or local law.

(h) "Obligor" means an individual having a legal obligation to pay alimony and/or child support.

(i) "Remuneration for employment" means compensation paid or payable for personal services whether such compensation is denominated as wages, salary, commission, bonus, pay, or otherwise, and includes, but is not limited to, those items set forth in sec. 581.103.

* * *

(c) 5 C.F.R., sec. 581.103

(c):

* * *

(4) Exceptions. Remuneration would not include:

* * *

(iii) Any payment by the Veterans Administration as pension; or

(iv) Any payments by the Veterans Administration as compensation for a service-connected disability or death, except any compensation paid by the Veterans Administration to a former member of the Armed Forces who is in receipt of retired or retainer pay if such former member has waived a portion of his/her retired pay in order to receive such compensation. In this case, only that part of the Veterans Administration payment which is in lieu of the waived retired/retainer pay is subject to garnishment. Payments of disability compensation by

the Veterans Administration to an individual whose entitlement to disability compensation is greater than his/her entitlement to retired pay, and who has waived all of his/her retired pay in favor of disability compensation, are not subject to garnishment or other attachment under this part.

(d) 5 C.F.R., sec. 581.104

Moneys which are not subject to garnishment.

* * *

(b) Payments or portions of payments made by the Veterans Administration pursuant to sections 501-562 of title 38 of the United States Code, in which the entitlement of the payee is based on non-service-connected disability or death, age and need;

* * *

(f) Veterans' educational assistance payments under sections 1651 et seq., of Title 38 of the United States Code;

* * *

(h)(2)(v) Armed Forces health professions scholarship stipends;

* * *

(h)(2)(x) ROTC subsistence allowance;

(e) 38 C.F.R., sec. 3.450

General.

(a)(1) All or any part of the pension, compensation, or emergency officers' retirement pay payable on account of any veteran may be apportioned.

(i) On behalf of his spouse, children, or dependent parents if the veteran is incompetent and is being furnished hospital treatment, institutional, or domiciliary care by the United States, or any political subdivision thereof.

(ii) If the veteran is not residing with his or her spouse, or if the veteran's children are not residing with the veteran and the veteran is not reasonably discharging his or her responsibility for the spouse's or children's support.

(f) 38 C.F.R., sec. 3.452

Veterans benefits apportionable.

Veterans benefits may be apportioned:

(a) If the veteran is not residing with his or her children and a claim for apportionment is filed for or on behalf of the spouse or children.

STATEMENT OF THE CASE

The facts of the case are undisputed and are not of great interest to this Court in determining the question presented for the appeal. They are set forth in detail, J.S., pp. 8-12. For the purpose of this appeal it is sufficient to note that the State court ordered the appellant, a triple amputee with one eye, resulting from enemy action in the former Republic of Vietnam, J.S., App. 24a, to pay child support to his former wife, who was awarded custody of the parties' two minor children, R. 10, from any funds available to him, but which must necessarily be paid mostly from his veterans disability benefits, J.S. 9, 11, R. 8-13, 28, 35-36.

SUMMARY OF ARGUMENT

The founders of this great nation wisely chose to place the awesome power, duty and responsibility of raising and supporting the military and of providing for the militia in the Congress, U. S. Const., Art. 1, Sec. 8, Cls. 12-15, 17 and entrusted the duty as Commander in Chief to the President, U. S. Const., Art. II, Sec. 2. After the founders adopted these separations of powers, the people in 1791 voted and ratified them. The Congress in furtherance of this purpose has enacted the Veterans' Benefits Act which echoes the words of President Abraham Lincoln who during his Second Inaugural Address on March 4, 1865, said, " . . . to care for him who shall have borne the battle"

Even at the expense of family mat-

ters, usually left for determination by the States, any attempt to limit or change those powers by a State is null and void, U.S. Const., Art. VI, Cl. 2.

Just as surely as the power to tax "may be exercised so as to destroy," *McCullough v. Maryland*, 4 Wheat. 316, 427, the power to control may be exercised so as to demoralize. If a nation's veterans are demoralized the power of any government to regulate its militia is lost.

If the American military and militia are to remain the most powerful physical force on earth, Congress has expressed that it must prove to that generation of young men, many of whom some day will again be killed or gravely wounded in battle, that this nation will indeed care for those who fight her battles. This principle is a catalysis which encourages young men to

enlist and make the ultimate sacrifice when necessary to keep the United States the "home of the free & the land of the brave," The Star-Spangled Banner.

No power, unless it be the people, must ever be allowed to question the Constitutional mandate of the founders that Congress regulate, support and provide for the military. These solid principles have endured the test of time and have been tempered by internal conflict.

Only the strength of the military, coupled with the free press which quickly and accurately reports all news and events affecting free peoples everywhere can keep this nation physically strong and free from aggressive forces, whether from abroad or south of the border. Like it or not, this nation shall always be required to carry

the cross of protection for the free world.

The Veterans' Benefits Act of Congress expressly reserves the control of veterans affairs in the Administrator of the Veterans Administration, 38 U.S.C. 101, et seq, and no other power, not the Judiciary, not the Presidency, and certainly not the States can exercise any control over veterans' benefits, not even for family purposes, without the consent of Congress. Congress has expressly stated its intent by making veterans' benefits non-taxable and nonassignable, 38 U.S.C. 3101(a), by giving the Administrator exclusive control over such benefits, 38 U.S.C. 211(a), by authorizing the Administrator to apportion them among family members as he deems proper, 38 U.S.C. 3107 and by enacting the Federal

Child Support Enforcement Act, 42 U.S.C. 611, et seq, which expressly excludes veterans' federal military disability benefits from garnishment and implies that any court order which attempts to frustrate that purpose, State, 42 U.S.C. 662(e)(1)(A), or federal, 38 U.S.C. 211(a), is null and void.

Clearly Tennessee does not have jurisdiction over veterans' disability benefits in this case. As the government pointed out in its Amicus Curiae Brief to Jurisdictional Statement, p. 10, it would be highly anomalous to believe that the States should be allowed to exercise jurisdiction over veterans in family monetary matters without giving them control over the funds from which the money is to be paid. If that is permitted then the laws of

Congress, 38 U.S.C. 101, et seq, and the implementing regulations of the Veterans' Administration, 38 C.F.R., sec. 3.401, et seq, have absolutely no effect. The power of the States to take a person's liberty for failure to obey a court order of support, Tennessee Code Annotated (T.C.A.), sec. 36-5-104, which can only be paid from veterans' disability benefits has the net and chilling effect of demoralizing veterans and frustrating the laws of Congress regulating veterans' affairs. The decision of the Tennessee Court of Appeals in this case stands in the way of Congressional purpose and must be set aside, *Hisquierdo v. Hisquierdo*, 439 U.S. 590.

ARGUMENT

The appellant is well aware that the whole area of domestic relations law is vested in the States and not subject to the laws of the United States, *McCarty v. McCarty*, 453 U.S. 208, 220, except when, on rare occasion, it conflicts with the express terms of federal law, which positively requires that State law be pre-empted under the Supremacy Clause of the Constitution, *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581. However, the presumption that Congressional acts are not intended to interfere with state domestic relations law, *Ray v. Atlantic Richfield Corporation*, 535 U.S. 151, does not apply where State domestic relations law does "'major damage' to 'clear and substantial' federal interests." *McCarty*, supra,

p. 220, citing *Hisquierdo*, supra, p. 581, "with references to *United States v. Yazell*, 382 U.S. 341, 352, 86 S. Ct. 500, 506, 15 L.Ed. 2d 404 (1966). See also *Alessi v. Raybestos-Manhattan, Inc.* 451 U.S. 504, 522, 101 S.Ct. 1895, 1905, 68 L.Ed. 2d 402 (1981)."

If State family law does "major damage" to "clear and substantial" federal interests "the Supremacy Clause will demand that state law be overridden." *Hisquierdo*, supra, p. 581, citing *United States v. Yazell*, 382 U.S. 341, 352.

In this case the Tennessee Court of Appeals affirmed a decision of the trial court which ordered a highly decorated veteran, J.S., App., 23a-24a, disabled in the line of duty to pay child support to his ex-wife which can only be paid, in substantial

part from his veterans' disability benefits, J.S. 9, 11, R. 8-13, 28.

The benefits at issue here come entirely from funds paid under the Veterans' Benefits Act, 38 U.S.C. 101, et seq. Appellant contends that these funds are exempt from the jurisdiction of State courts, because they are non-assignable and because Congress has expressly stated that such funds are exempt from attachment either before or after receipt by the beneficiary, 38 U.S.C 3101(a), except that they may be apportioned among the veteran and his dependents "as may be prescribed by the Administrator," 38 U.S.C 3107 (c).

Some States have held that Congress never intended to deprive the State courts of jurisdiction over such family matters, *Meadows v. Meadows*

(Okla. 1980) 619 P. 2d 598, *Cohen v. Murphy*, 366 Mass. 144 (1970), *In re Gardner*, 220 Wisc. 493 (1936), *Pishue v. Pishue*, 32 Wash. 2d 750 (1949) and *Gaskins v. Security-First National Bank of Los Angeles*, 30 Cal. App. 2d 409 (1939). Others have held that State courts are without subject matter jurisdiction in such cases because the Supremacy Clause pre-empts State law, *Ex parte Burson* (Tex. 1980) 615 S.W. 2d 192, *In re Irish* (Ida. 1932) 9 P. 2d 502, *In re Paniewski*, 107 Ill. App. 3d 848 (1982) and *Rickman v. Rickman* (Ariz. App. 1980) 605 P. 2d 909.

The cases which have held that the States are without subject matter jurisdiction are correct. The Congress expressly stated that "the decisions of the Administrator on any question

of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents . . . shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise," 38 U.S.C. 211(a). Thus, Congress has clearly stated that veterans' benefits are not subject to control by any power except the Administrator.

"Congress clearly has the right to establish a procedure from disbursement of benefits to veterans and others through its enumerated power to raise and maintain an army and navy." *Colorado v. Veterans Administration*, 430 F. Supp. 551 (1977), affirmed 602 F. 2d 926, certiorari denied 444 U.S. 1014. See

also, *De Rodulfa v. United States*, 461 F. 2d 1240, certiorari denied 409 U.S. 949, *Johnson v. Robinson*, 415 U.S. 361, *Rostker v. Goldberg*, 453 U.S. 57.

Some of the courts which have held that States are without subject matter jurisdiction have decided the issue on the ground that veterans' benefits, like those in *McCarty* and *Hisquierdo*, both *supra*, are a gratuity, 38 U.S.C. 310, *Milliken v. Gleason*, 332 F. 2d 122, *De Rodulfa v. United States*, *supra*, and as such are exempt from consideration by State courts in ordering child support payments.

Those decisions can be supported under the federal Child Support Enforcement Act which exempts funds from garnishment if entitlement is not based upon remuneration for employment.

42 U.S.C. 659(a). By express terms, veterans benefits compensating an individual for a service-connected disability, being gratuities, are exempt from garnishment unless the veteran has waived a portion of his retirement pay which is based upon remuneration for employment to receive veterans benefits, 42 U.S.C. 662(f)(2). In such cases, the amount not waived may be garnished under the act, 5 C. F.R., sec. 581.103(c)(4)(iv). The appellant receives no retirement pay, only social security benefits (not at issue here, J.S. 16) and veterans disability benefits, J.S. 9, R. 28, 35-36.

The appellee might argue that 42 U.S.C. 662(f)(2) which exempts veterans benefits from garnishment "does no more than restate the Govern-

ment's sovereign immunity from burdensome garnishment suits, and so has no effect on her right to require (appellant) to (pay) her as he receives (his) benefits," *Hisquierdo*, supra, p. 586, as the petitioner did in that case.

This court rejected that argument:

We, however, cannot so lightly discard the settled view that anti-assignment statutes have substantive meaning. . . . Its terms (45 U.S.C. 231m (The Railroad Retirement Act)) make no exception for a spouse. The judicial construction on which respondent relies is a child of equity, not of law. Id.

The question presented here, not unlike the one presented in the *Hisquierdo* case, is whether State Courts can exercise jurisdiction to order child support payments from veterans benefits or whether the Supremacy Clause pre-empts State law.

The appellant is not unmindful

that a mere conflict in words between State and federal law is insufficient to pre-empt State law, *McCarty, supra*, p. 232, citing *Hisquierdo, supra*, pp. 581-583.

The twofold test is "whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecongruence," *McCarty, supra*, p. 221, citing *Hisquierdo, supra*, p. 583.

In this case Congress has expressly stated that the appellant's benefits "may be apportioned as may be prescribed by the Administrator" for child support, 38 U.S.C. 3107(a)(2). Federal regulations have been adopted to set up the procedure for apportionment, 38 C.F.R. 3.450, et seq. Specifically:

Veterans benefits may be apportioned:

(a) If the veteran is not residing with his or her children and a claim for apportionment is filed for or on behalf of the . . . children. 38 C.F.R., sec. 3.452.

Like non-disability retirement, veterans' benefits are "as much a personnel management tool as an income maintenance method," *McCarty, supra*, p. 213. Disability retirement "serves a distinct purpose within the overall objective of maintaining a young and vigorous (military) force," *Dual Compensation Paid to Retired Uniformed Services' Personnel in Federal Civilian Positions: Hearing before the Subcomm. on Investigations, House Comm. on Post Office and Civil Service, 95th Cong., 2d Sess. (1978) (Dual Compensation)*, p. 18.

Congress has "spoken with force

and clarity in directing that the proceeds belong to the named beneficiary and no other," McCarty, *supra*, p. 225, citing *Wissner v. Wissner*, 338 U.S. 655, except his dependents and survivors, 38 U.S.C. 211(a), but only to the extent that the Administrator may apportion them, 38 U.S.C. 3107. No doubt the Congress had in mind that the Administrator is in a better position than State courts to weigh the needs of the family against the personal maintenance needs of the disabled veteran.

The power of Congress to make such policy decisions is broad:

. . . This Court has consistently recognized Congress' "broad constitutional power" to raise and regulate armies and navies, *Schlesinger v. Ballard*, 419 U.S. 498, 510, 95 S.Ct. 572, 578, 42 L. Ed. 2d 610 (1975). . . . "The constitutional power of Congress to raise and support armies and to make

all laws necessary and proper to that end is broad and sweeping.'" *United States v. O'Brien*, 391 U.S. 376, 377, 88 S.Ct. 1673, 1679, 20 L.Ed. 2d 672 (1968). See *Lichter v. United States*, 334 U.S. 742, 755, 68 S.Ct. 1294, 1301, 92 L.Ed. 1694 (1948).

Not only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked. In *Gilligan v. Morgan*, 413 U.S. 1, 10, 93 S.Ct. 2440, 2446, 37 L.Ed. 2d 407 (1973), the Court noted:

"(I)t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.'"

Rostker v. Goldberg, 453 U.S. 57, 65-

66.

Congress, in adopting the Child Support Enforcement Act "thought that a family's need for support could justify garnishment, even though it deflected other federal benefit programs from their intended goals," *Hisquierdo*, supra, 587, but benefits for disabled veterans was not one of the other federal programs deflected, 42 U.S.C. 662(f)(2).

As the government pointed out in its amicus curiae brief to Jurisdictional Statement, pp. 3-4, veterans benefits are not subject to garnishment for child support payments, 42 U.S.C. 659(a), 5 C.F.R., sec. 581.103(c)(4) (iv). The government refuses to honor child support garnishments unless made in accordance with State law, 42 U.S.C. 662(b) by courts of competent juris-

diction, 42 U.S.C. 662(e)(1)(A), presumably over the subject matter. Congress expressly excluded veterans disability benefits from State court jurisdiction, 42 U.S.C. 662(f)(2). See also, 5 C.F.R., sec. 581.103(c).

Accordingly, in order to carry out the intent of Congress and prevent frustration of its purposes, this Court should hold that State courts are without subject matter jurisdiction to order payments of any kind which can only be paid from a veteran's disability benefits, 38 U.S.C. 211(a), 38 U.S.C. 3101, 42 U.S.C. 662(e)(1)(A). As in *McCarty*, the facts of this case make it clear that "it is manifest that the application of" State support principles to veterans' disability compensation "threatens grave harm to "'clear and substantial'" federal interests. See *United States v.*

Yazell, 382 U.S., at 352, 86 S. Ct., at 507." McCarty, supra, p. 232.

. . . Under the Constitution, Congress has the power "(t)o raise and support Armies," "(t)o provide and maintain a Navy," and "(t)o make Rules for the Government and Regulation of the land and naval Forces." U.S. Const., Art. I, sec. 8, cls. 12, 13, and 14. See generally Rostker v. Goldberg, 453 U.S. 57, 59, 101 S.Ct. 2646, 2649, 69 L. Ed. 2d 478. Pursuant to this grant of authority, Congress has enacted a military retirement system (which includes disability retirement) designed to accomplish two major goals: to provide for the retired service member, and to meet the personnel management needs of the active military forces. The community property division of retired pay (and State ordered support) ha(ve) the potential to frustrate each of these objectives.

McCarty, supra, pp. 232-233.

That Congressional objectives would be frustrated if states are permitted to order support based on vet-

erans disability benefits is evidenced by the fact that the Child Support Enforcement Act expressly states that veterans' disability benefits are not to be garnished. Any writ or other process issued by a State court if issued for that purpose is not issued by a court of competent jurisdiction, 42 U.S.C. 662(e). Accordingly, the government will not honor garnishments issued by State courts to be paid from such exempt funds, 42 U.S.C. 662(f)(2). The proper vehicle for an ex-spouse under such circumstances is to petition the Administrator of the Veterans Administration, 38 U.S.C. 211(a), 38 U.S.C. 3107, 38 C.F.R. 3.452.

If Congress had not intended to deprive State courts of jurisdiction over veterans in support matters it would never have given the Adminis-

trator final and conclusive jurisdiction over all questions of law and fact, 38 U.S.C. 211(a) and would not have excluded veterans benefits from garnishment under 42 U.S.C. 662(f)(2). Without this interpretation of the law, it has no substantive meaning, *Hisquierdo*, supra, 586.

When Congress originally enacted the Child Support Enforcement Act it failed to expressly state that veterans disability benefits were immune from garnishment; however, two years later it enacted 42 U.S.C. 662(f)(2) which did expressly exclude veterans disability benefits from garnishment for child support purposes, *Veterans Administration v. Kee* (Tex. 1986) 706 S.W. 2d 101, as noted by the Supreme Court of Texas, who has probably studied this matter and rendered more in-depth deci-

sions on the subject than any other court in the nation.

It is clear that when Congress enacted the Child Support Enforcement Act it intended to remove governmental immunity from garnishment proceedings. It is equally clear that Congress intended not to remove jurisdiction over veterans and their disability benefits from the Administrator in order that disabled American veterans "would have secured to them their disability benefits to the extent (the Administrator deems) necessary to take care of their essential needs," *Veterans Administration v. Kee*, supra, 102. Accordingly, Congress permitted retirement benefits based upon remuneration for services to be garnished for child support, 42 U.S.C. 659(a), but not gratuitous veterans disability benefits, 42 U.S.C.

662(f)(2). "State courts are not free to reduce the amounts that Congress has determined are necessary for the retired member," McCarty, *supra*, 233, whether from time or disability.

While one might argue that Congress did not intend to override state law in military and veterans affairs because it subsequently enacted laws which had the effect of overriding McCarty, such "are policy issues for Congress to decide," McCarty, 235, n. 26, 236, and not the courts. This Court accords Congress greater deference in the conduct and control of military affairs than in any other matters, McCarty, *supra*, 236, citing *Rostker v. Goldberg*, *supra*. "Congress has weighed the matter, and '(i)t is not the province of State courts to strike a balance different from the

one Congress has struck,'" McCarty, *supra*, 236, citing *Hisquierdo*, *supra*, 590.

Congress never intended to leave veterans affairs to the states, other than those already stated. Federal regulations were adopted to enforce the Congressional mandate that certain benefits not be subject to garnishment: non-service connected disability or death benefits, 5 C.F.R., sec. 581.104(b), veterans' educational assistance payments, 5 C.F.R., sec. 581.104(f), Armed Forces health professions scholarship stipends, 5 C.F.R., sec. 581.104(h)(2)(v) and ROTC subsistence allowances, 5 C.F.R., sec. 581.104(h)(2)(x).

Inasmuch as there is a conflict between the terms of the Veterans' Benefits Act and Tennessee law, unless

this court finds that the ex-wife must petition the Administrator for child support an important federal program will be frustrated. The reasoning of the trial court and the Tennessee Court of Appeals that the state has jurisdiction because this is not a case involving garnishment but failure to comply with a court order was that it does not matter where the appellant gets the money to pay his support he either pays it or goes to jail. This policy frustrates the federal purpose to provide for the disabled veteran through a federal vehicle which "is intended to provide financial security for personnel forced by physical disability to retire from military service," in part to enable the country to maintain a youthful and vigorous military force, Dual Compensation, *supra*, pp. 18, 19.

State laws give jurisdiction over support to the State courts and T.C.A., sec. 36-5-104, stated in full in J.S. 8, provides that a parent can be imprisoned for up to six months if he fails to comply with a court order for child support. The record clearly indicates that the appellant must use his veterans' disability benefits to pay a substantial portion of the child support ordered by the trial court, J.S. 9, 11, R. 10-13, 28, 33, 35-36.

This Court could find that assets purchased by the appellant could be sold to pay child support, but 38 U.S.C. 3101 (a) states that veterans' benefits are exempt from process both "before or after receipt by the beneficiary," and such a finding "would upset the statutory balance and impair (appellant's) economic security just as surely as

would a regular deduction from his benefit check. The harm might well be greater," Hisquierdo, *supra*, 588. This Court could also find, as the State courts apparently did that it was Congress' intent to exclude disability veterans' benefits from legal process but not the veteran from state court personal jurisdiction and permit the courts to once again incarcerate the appellant, R. 37, 40, but to do so would "penalize one whom Congress has sought to protect. It thus causes the kind of injury to federal interests that the Supremacy Clause forbids. It is not the province of State courts to strike a balance different from the one Congress has struck." Hisquierdo, *supra*, 590, cited in party by McCarty, *supra*, 236.

In this case any attempt by the

State to enforce its order for child support as defined by 42 U.S.C. 662(b) has the chilling effect of denying an individual the right to assert his rights under federal law. The order of the trial court and the Tennessee Court of Appeals "conflicts with the express terms of federal law and . . . its consequences sufficiently injure the objectives of the federal program (so as) to require nonrecognition," Hisquierdo, *supra*, 583.

CONCLUSION

For the foregoing reasons your appellant prays this Honorable Court will find that the trial court and the Tennessee Court of Appeals are without subject matter jurisdiction over the veteran and his veterans' disability benefits to order child support, including attorney's fees and court costs, 42 U.S.C. 662(b), in this case and remand for further proceedings not inconsistent with such an opinion.

Respectfully Submitted,

CHARLIE WAYNE ROSE



By:

Jerry S. Jones, his Lawyer

August 1986

APPELLEE'S

BRIEF

OCT 10 1986

JOSEPH F. SPANIOL, JR.
CLERK

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No. 85-1206

In The
Supreme Court of the United States
October Term, 1986

— o —
CHARLIE WAYNE ROSE,
Appellant,
v.

BARBARA ANN McNEIL ROSE and
THE STATE OF TENNESSEE,
Appellees.

— o —
On Appeal From the Court of Appeals of Tennessee,
Eastern Division

— o —
BRIEF OF APPELLEE STATE OF TENNESSEE

— o —
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QUESTION PRESENTED FOR REVIEW

Whether the Supremacy Clause of the United States Constitution deprives a state court of jurisdiction to order and enforce child support orders which include consideration of veterans' benefits as a financial resource.

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No. 85-1206

In The
Supreme Court of the United States
October Term, 1986

CHARLIE WAYNE ROSE,
Appellant,
v.

BARBARA ANN McNEIL ROSE and
THE STATE OF TENNESSEE,
Appellees.

On Appeal From the Court of Appeals of Tennessee,
Eastern Division

BRIEF OF APPELLEE STATE OF TENNESSEE

STATEMENT OF THE CASE

The appellant is a permanently and totally disabled veteran. Due to his services in the Vietnam conflict, he lost both legs, his right arm below the elbow and his right eye. (R: 27). The appellant's monthly income consists of \$281.00 a month for social security disability benefits and \$3,323.00 a month in veterans' disability benefits.¹

¹These figures represent current benefits under 38 U.S.C.A. § 314(o), (p) and (r). These total benefits of \$3,604.00 provide \$43,248.00 yearly. The appellant's veterans' disability benefits are

(Continued on following page)

(J.S. App. 8a). The appellant also receives \$99.00 a month pursuant to 38 U.S.C.A. § 315(1)(c) from the Veterans' Administration on behalf of his two minor children. (J.S. App. 8a). In addition, the appellant's minor children receive \$94.00 a month from the Social Security Administration. (J.S. App. 7a).

The appellant and the appellee, Barbara Ann McNeil Rose, were married on March 4, 1973, after the appellant's disability. (R: 2). Mr. and Mrs. Rose have two children who were six and nine years old at the time the complaint for divorce was filed by Mrs. Rose in 1983. (R: 2). The final decree granting Mrs. Rose a divorce was entered on October 25, 1983. (R: 8). This decree ordered the appellant to pay \$800.00 per month child support. (R: 8). This decree also ordered a division of the marital property. (R: 8).² This decree was not appealed by either party.

On April 19, 1984, Mrs. Rose filed a petition for contempt asserting that the appellant had only paid \$90.00 child support for the month of April and was refusing

(Continued from previous page)

tax exempt. 38 U.S.C.A. § 3101(a). The Veterans' Benefits provisions of Title 38 also provide for a yearly clothing allowance of \$360 applicable to a prosthetic appliance (including a wheelchair), 38 U.S.C.A. § 362; hospital care, nursing home care or domiciliary care and medical services, 38 U.S.C.A. §§ 610-612, 630, including counseling and mental health services, §§ 612(A) and (B); fitting and training in use of prosthetic appliances, 38 U.S.C.A. § 614; and lifts and rehabilitative devices, 38 U.S.C.A. § 617.

²The appellant was awarded the parties' 1983 Chevrolet van and assorted household furniture and furnishings. (R: 8). In addition, the Court ordered the sale of the marital home and division of equity. The appellant received approximately \$12,000.00 from the sale of this house. (R: 6, Vol. II).

to pay the remaining amount of support. (R: 23). The appellant asserted that the trial court lacked jurisdiction to order him to pay child support from his social security benefits and veterans' disability benefits. (R: 27). The appellant also asserted that Tenn. Code Ann. § 36-5-101 (formerly T.C.A. § 36-801) was unconstitutional insofar as it vested jurisdiction in the trial court to consider the appellant's income from disability benefits in setting the amount of child support. The appellee, State of Tennessee, was made a party to this action to defend the constitutionality of the state statute. (R: 27).

The Circuit Court for Washington County, Tennessee granted the summary judgment motion of the appellee State of Tennessee and held that Tenn. Code Ann. § 36-5-101 is constitutional. (J.S. App. 13a). The Circuit Court also held the appellant to be in contempt for failure to pay child support. (J.S. App. 6a). This decision was upheld on appeal to the Tennessee Court of Appeals. (J.S. App. 1a). Permission to appeal was denied by the Tennessee Supreme Court. (J.S. App. 22a). This Court noted probable jurisdiction on June 30, 1986.

SUMMARY OF ARGUMENT

State domestic relations law authorizes Tennessee courts to determine and enforce duties of parental support for minor children. Tenn. Code Ann. § 36-5-101. In determining the amount of support, Tennessee courts consider various relevant factors including the age; physical, mental and emotional condition of the child; the

educational needs of the child; and the earning capacity, obligations, needs and financial resources of each parent. Tenn. Code Ann. § 36-5-101(e). The needs of the child and the ability of each parent to contribute are the paramount factors. *Allison v. Allison*, 638 S.W.2d 394 (Tenn. App. 1982).

The consideration of veterans' benefits as a financial resource by a state court in ordering child support does not violate the Supremacy Clause of the United States Constitution. The three Veterans' Administration provisions primarily relied upon by the appellant and the Solicitor General, 38 U.S.C.A. § 3107, 38 U.S.C.A. § 211(a), and 38 U.S.C.A. § 3101(a), do not address state child support enforcement. By contrast, preemption of state domestic relations law must be premised upon actual conflict with the express terms of the federal law and upon a finding that Congress has "positively required by direct enactment that state law be preempted." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, 99 S.Ct. 802, 808 (1979), quoting *Wetmore v. Markoe*, 196 U.S. 68, 77, 25 S.Ct. 172, 176 (1904). While preemption must be based upon a finding that the state law inflicts major damage to clear and substantial federal interests, *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728 (1981); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S.Ct. 802; *United States v. Yazell*, 382 U.S. 341, 86 S.Ct. 500 (1966), neither the legislative history nor the goals underlying the federal statutes at issue suggest any federal interests at odds with state enforcement of child support obligations. To the contrary, Congress has directed that states and local governments focus upon the issues of child support and recognized that they retain jurisdiction over such issues.

Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, § 23(a), 98 Stat. 1305, 1329 (1984).

There is no conflict with the express terms or the policies underlying the three provisions at issue. Pursuant to 38 U.S.C.A. § 3101, the administrator "may" apportion the veteran's benefits if the veteran's children are not in his custody. However, neither 38 U.S.C.A. § 211 nor its legislative history expressly deprives a state court of jurisdiction to order child support payments based in part upon a veteran's disability benefits. The state courts are not attempting to review a decision of the administrator on a question of law or fact. State child support cases do not address factual questions concerning the technical and complex determinations and applications of Veterans' Administration policy which Congress was attempting to protect.

Enforcement of a child support duty by a state trial court through the use of contempt powers does not involve a garnishment in violation of 38 U.S.C.A. § 3101(a). The state court did not order a levy or attachment on the appellant's veterans' benefits. Child support is not a "debt" in the ordinary sense. *Wetmore v. Markoe*, 196 U.S. at 76, 25 S.Ct. at 174-175. Historically, many courts have held that the exemption provision in 38 U.S.C.A. § 3101(a) does not apply to child support. See e.g., *In re Gardner*, 220 Wis. 493, 264 N.W. 643 (1936); *Gaskins v. Security First Nat'l. Bank of Los Angeles*, 30 Cal. App.2d 409, 86 P.2d 681 (1939); *Pishue v. Pishue*, 32 Wash.2d 750, 203 P.2d 1070 (1949); *McCarthy v. Brainard*, 6 A.D.2d 1029, 178 N.Y.S.2d 403 (1958); *Dillard v. Dillard*, 341 S.W.2d 668 (Tex. Civ. App. 1960). Congress, which

must be presumed to be aware of these prior judicial constructions, has reenacted this statute without change.

There are no consequences of a state court's jurisdiction over child support enforcement which substantially injure the objectives of the Veterans' Administration program. The trial court's order in this case does not involve the Veterans' Administration. No challenge to any factual or legal determination by the Administrator is at issue. The disability benefits are sent to the veteran as usual. Compliance with the court's order will not deplete the means of the veteran's support, as the Court considered the appellant's needs in setting the amount of child support.

Ordering a veteran to pay child support out of his veterans' disability benefits is consistent with the purposes underlying the federal provisions at issue. Veterans' benefits are intended to provide the veteran and his dependents with some degree of security and to protect the public from pauperism of the recipient and his dependents. *In re Guardianship of Weinberg*, 201 Misc. 489, 110 N.Y.S.2d 130, 135 (1952) [citing *Yates County National Bank v. Carpenter*, 119 N.Y. 550, 555, 23 N.E. 1108, 1109 (1890) and *In re Flanagan*, 31 F. Supp. 402, 403 (D.D.C. 1940)]. Veterans' benefits help replace funds lost as a consequence of the decreased earning capacity of veterans disabled due to their military service. *In re Marriage of Hapaniewski*, 107 Ill. App. 3d 848, 438 N.E.2d 466 (1982); H.R. Rep. No. 1155, 96th Cong., 2d Sess. 1, 4, reprinted in 1980 U.S. Code Cong. & Ad. News 3307, 3310. Thus, a veteran's disability benefits are intended for the protection and support of his dependents as well as for the protection and support of the veteran.

Congress did not intend that veterans be relieved of their obligation to support their minor children because they were disabled due to military service. Yet the appellant asserts that his veterans' benefits cannot be considered as a financial resource by the state court in setting child support. If the appellant does not support his children, the burden of support may shift to the State of Tennessee. There is no indication that Congress intended such a result. Congress clearly intended that a veteran's disability benefits may be used to support his children.

State courts have traditionally determined the amount of child support to be paid by each parent. State courts have the necessary expertise and experience to make these decisions, including continuing jurisdiction over the parties to decide any issues which might arise from a change of circumstances. *See Hicks v. Hicks*, 26 Tenn. App. 641, 176 S.W.2d 371 (1943); Tenn. Code Ann. § 36-5-101(a)(1). The Veterans' Administration does not have expertise or experience in determining the proper amount of child support. Nor do the veterans' benefits statutes give the Veterans' Administration exclusive authority to deal with this issue. A requirement that any support derived from VA disability benefits must be ordered by the Veterans' Administrator would undercut an entire system of state child support laws and render a state court order of support an unenforceable advisory opinion. Moreover, it would make the Veterans' Administration a domestic relations tribunal for a limited class of state residents, while leaving undisturbed state court jurisdiction over all others. Thus, it would effectively remove the judicially enforceable right of children to financial support from one of their parents when one

parent is a disabled veteran. Such usurpation of state authority has not been expressly required by Congress and should be rejected by this Court. Therefore, since there is no conflict with the express terms of federal law and no injury to the Veterans' Administration program by allowing state courts to consider veterans' benefits, the Supremacy Clause of the United States Constitution does not deprive a state court of jurisdiction to consider veterans' disability benefits as a financial resource when ordering the appropriate amount of child support payments.

ARGUMENT

I. STATE DOMESTIC RELATIONS LAW PROPERLY GOVERNS CHILD SUPPORT DUTIES.

The Solicitor General acknowledges that state courts retain jurisdiction ". . . to consider a veteran's total income . . ." but contends any support derived from VA disability benefits must be apportioned by the Veterans' Administrator. (Brief of the Solicitor General, p. 12, n.13). Such procedure would undercut an entire system of state child support laws and render a court order of support an unenforceable advisory opinion. It would make the Veterans' Administration a domestic tribunal for certain state residents, while state courts would continue to exercise jurisdiction over all others. It would effectively remove the judicially enforceable right of children to financial support from one of their parents when one parent is a disabled veteran. Tennessee courts and

all other state courts must retain the authority and the jurisdiction to enforce orders of child support.

In the instant case, appellant did not challenge the initial consideration of all of his resources, but interposed his preemption defense when he was cited for contempt for failure to support. (J.S. App. 2). Tennessee courts are authorized to rely upon the traditional civil contempt powers for enforcement of a decree ordering child support. *See Sowell v. Sowell*, 493 S.W.2d 86, 87 (Tenn. 1973), Tenn. Code Ann. § 36-5-103.³

Child support enforcement is but one area of state domestic relations law. This one area, however, affects many others. As recently as 1984, Congress expressly found that:

(1) the divorce rate in the United States has reached alarming proportions and the number of children being raised in single parent families has grown accordingly;

(2) there is a critical lack of child support enforcement, which Congress has undertaken to address through the child support enforcement program;

(3) Congress is strengthening that program to recognize the needs of all children;

(4) *related domestic issues, such as visitation rights and child custody, are often intricately intertwined with the child support problem and have received inadequate consideration; and*

³No criminal proceeding for failure to support a child, Tenn. Code Ann. § 36-5-104; order of interest in real or personal property, Tenn. Code Ann. § 36-5-102; execution, Tenn. Code Ann. § 36-5-103; or assignment, Tenn. Code Ann. § 36-5-501 is at issue.

(5) *these related issues remain within the jurisdiction of State and local governments*, but have a critical impact on the health and welfare of the children of the Nation.

Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, § 23(a), 98 Stat. 1305, 1329 (1984). (Emphasis added). Congress also stated its sense that:

(1) *State and local governments must focus on the vital issues of child support, child custody, visitation rights, and other related domestic issues that are properly within the jurisdictions of such governments;*

(2) all individuals involved in the domestic relations process should recognize the seriousness of these matters to the health and welfare of our Nation's children and assign them the highest priority; and

(3) a mutual recognition of the needs of all parties involved in divorce actions will greatly enhance the health and welfare of America's children and families.

Id. § 23(b), 98 Stat. 1330 (emphasis added). Thus, Congress has recognized that the numerous interrelated problems arising from our nation's large divorce rate must be addressed by each state government.⁴ This is an absolute necessity if the needs of all parties involved in divorce actions, including those of the children, are to be met. As Congress indicated, the totality of family responsibilities, obligations and needs are best determined by the states.

⁴Children have displaced the aged as the poorest age group. In 1983, there were 13.8 million children in poverty, of whom more than one-half lived in families headed by a woman. *House Comm. on Ways and Means, Children in Poverty*, H.R. Doc. No. 8, 99th Cong., 1st Sess. 3 (1985).

Removing disability benefits from state courts' consideration and enforcement powers would lead to piecemeal state and federal efforts that serve no one's best interests.

This Court has recognized that the obligation of support is universal in this country. *Wetmore v. Markoe*, 196 U.S. 68, 75, 25 S.Ct. 172, 175 (1904). Likewise, Congress has recognized the severity of the problem of non-support by absent parents and that "all children have the right to receive support from their fathers." S. Rep. No. 1356, 93d Cong., 2nd Sess. 14, *reprinted in* 1974 U.S. Code Cong. & Ad. News, 8146. In enacting the Social Services Amendments of 1974, Pub.L. No. 93-647, § 101(a) 88 Stat. 2337, 2739, 2740, the Senate Committee on Finance noted that the act "leaves basic responsibility for child support and establishment of paternity to the State . . . [while giving] direct assistance to the states in locating absent parents and obtaining support payments from them." S. Rep. No. 1356, 93d Cong., 2d Sess. 18, *reprinted in* 1974 U.S. Code Cong. & Ad. News 8150.

The authority of the states to enforce child support duties recognized by both Congress and this Court is but a small part of the general *parens patriae* powers which govern the area of domestic relations law. The authority of the state, as *parens patriae*, extends to the often overlapping issues of legitimation, paternity, child custody and support enforcement, removal of children from abusive circumstances, adoption, guardianship, intestate succession and welfare programs, such as A.F.D.C. and food stamps. Its breadth has been repeatedly recognized by this Court. *See, e.g., Prince v. Massachusetts*, 321 U.S. 158, 166-167, 64 S.Ct. 438 (1944); *In re of Gault*, 387 U.S. 1, 16, 87 S.Ct.

1428, 1438 (1967); *Ginsberg v. New York*, 390 U.S. 629, 639, 88 S.Ct. 1274, 1280 (1968); *Stanley v. Illinois*, 405 U.S. 645, 652, 92 S.Ct. 1208, 1213 (1972). As this Court recognized in *Fontaine v. Ravenel*, *parens patriae* powers belong to the states as *parens patriae* and are not conferred upon the United States courts. (17 How. 369, 393), 58 U.S. 80 (1854).

So paramount are the concerns for the interests of the child that a trial court retains continuing jurisdiction of all decrees of custody and support and their enforcement to make modifications if necessary. *Hicks v. Hicks*, 26 Tenn. App. 641, 176 S.W.2d 371 (1943). See Tenn. Code Ann. § 36-5-101(a)(1).

Tennessee law provides that both fathers and mothers are responsible for the support of their minor children. Tenn. Code Ann. § 34-1-101; *Pickett v. Brown*, 462 U.S. 1, 103 S.Ct. 2199 (1983); *Rose Funeral Home, Inc. v. Julian*, 176 Tenn. 534, 144 S.W.2d 755 (1940). When determining the appropriate amount of child support to order, Tenn. Code Ann. § 36-5-101(e) requires the court to consider all relevant factors, including:

- (1) The age, physical, mental and emotional condition of each child;
- (2) The educational needs of each child and the educational advantages each child had available at the time the circumstances requiring a court order for his or her support arose;
- (3) The earning capacity, obligations and needs, and financial resources of each parent;
- (4) The contributions, monetary and nonmonetary, of each party to the well-being of the children;
- (5) The financial resources of each child;

(6) The standard of living each child has enjoyed during the marriage; and

(7) Such other factors as are necessary to consider the equities for the parents and children.

Tenn. Code Ann. § 36-5-101(e). The needs of the child and the ability of each of the parents to contribute are the paramount factors. *Allison v. Allison*, 638 S.W.2d 394 (Tenn. App. 1982).

II. PREEMPTION OF STATE DOMESTIC RELATIONS LAW REQUIRES AN EXPRESS CONGRESSIONAL ENACTMENT.

When a state's exercise of its police powers is the subject of a challenge under the Supremacy Clause, the court's examination must "start with the assumption that the historic police powers of the states were not to be superseded by the federal act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152 (1947). Preemption of state law by a federal statute is not favored. *Chicago and North Western Transportation Co. v. Kalo Brick and Tile Co.*, 450 U.S. 311, 101 S.Ct. 1124 (1981).

This presumption in favor of state law is most pronounced in the field of domestic relations. "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-594, 10 S.Ct. 850, 853 (1890). As a result, "there is no federal law of domestic relations, which is primarily a matter of state concern." *DeSylva v. Balentine*, 351 U.S. 570, 580, 76 S.Ct. 974, 980 (1956). "Both

the theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family property arrangements." *United States v. Yazell*, 382 U.S. 341, 352, 86 S.Ct. 500, 507 (1966). See also *Overman v. United States*, 563 F.2d 1287, 1290 (8th Cir. 1977); *In re Marriage of Pardee*, 408 F.Supp. 666 (C.D. Cal. 1976).

In cases where state domestic relations laws have been alleged to conflict with a federal statute, the United States Supreme Court has exercised review to determine whether Congress has "positively required by direct enactment that state law be preempted." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, 99 S.Ct. 802, 808 (1979), quoting *Wetmore v. Markoe*, 196 U.S. 68, 77, 25 S.Ct. 172, 176 (1904). Consequently, a mere conflict in words will not be deemed sufficient to justify striking down the state law. *Hisquierdo v. Hisquierdo*, *supra*. Rather, the state law must inflict major damage to clear and substantial federal interests before the Supremacy Clause will require that the law be overridden. *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728 (1981); *Hisquierdo v. Hisquierdo*, *supra*; *United States v. Yazell*, 382 U.S. 341, 86 S.Ct. 500 (1966).

The high standards which must be met in order for a state domestic relations statute to be invalidated under the Supremacy Clause have been summarized by the United States Supreme Court as follows:

[t]he pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require non-recognition.

Hisquierdo v. Hisquierdo, 439 U.S. at 583, 99 S.Ct. at 809; *McCarty v. McCarty*, 453 U.S. at 221, 101 S.Ct. at 2735.

III. NO FEDERAL LAW POSITIVELY REQUIRES PREEMPTION OF STATE DOMESTIC LAW IN FAVOR OF THE VETERANS ADMINISTRATION AS TO CHILD SUPPORT ENFORCEMENT.

The appellant and the Solicitor General have characterized the instant case as one of conflict between state domestic relations law and federal statutes governing veterans' benefits. Their argument primarily is premised upon three Veterans' Administration provisions: 38 U.S.C.A. § 3107, permitting apportionment of veterans' benefits; 38 U.S.C.A. § 211(a), providing finality for decisions of the Administrator; and 38 U.S.C.A. § 3101(a), prohibiting assignment and attachment of veterans' benefits. An examination of the express language of the statutes reveals that no actual conflict is occasioned by the Tennessee decision. Moreover, analysis of the congressional policies through legislative history demonstrates that the Tennessee decision inflicts no damage to clear and substantial federal interests. See *McCarty*, 453 U.S. at 221, 101 S.Ct. at 2735; *Hisquierdo*, 439 U.S. at 583, 99 S.Ct. at 809.

A. 38 U.S.C.A. § 3107 DOES NOT ADDRESS TRADITIONAL STATE COURT JURISDICTION OVER CHILD SUPPORT; NO FEDERAL EXCLUSIVITY IS MANDATED.

The first provision relied upon by appellant and the Solicitor General is 38 U.S.C.A. § 3107, which states:

(a) All or any part of the compensation, pension, or emergency officers' retirement pay payable on account of any veteran may—

• • •

(2) if the veteran is not living with the veteran's spouse, or if the veteran's children are not in the custody of the veteran, be apportioned as may be prescribed by the Administrator.

38 U.S.C.A. § 3107(a)(2). Nothing in this provision indicates that a state court is deprived of jurisdiction to order child support payments which are based in part upon a veteran's disability benefits or to enforce such orders. The legislative history is similarly silent in this respect. The statute merely states that compensation "may" be apportioned if the veteran's children are not in the veteran's custody. Generally, it is assumed that the legislative purpose is expressed by the ordinary meaning of the words used. *United States v. Locke*, 105 S.Ct. 1785, 53 U.S.L.W. 4433 (1985). The word "may" has been described by this Court as "an auxiliary verb, qualifying the meaning of another verb by expressing ability, . . . contingency or liability, or possibility or probability." *United States v. Lexington Mill and Elevator Co.*, 232 U.S. 399, 34 S.Ct. 337 (1914). It permits the Administrator to exercise discretion when called upon to apportion benefits. The word "may" does not denote exclusivity. It merely indicates ability.

The Solicitor General apparently seeks to minimize the effect of a holding of Veterans' Administrator exclusivity by noting that the July, 1986, benefits of 27,263 veterans were apportioned. (Brief of the Solicitor General

at 11, n. 12). Since this number is not broken down into categories and its source is not cited, it is impossible to determine how many apportionments were made under 38 U.S.C.A. § 3107(a)(2). Clearly, however, the number of apportionments is very small in relation to the number of veterans who have dependents and who receive disability benefits. The VA's Annual Report indicates that there were 975,443 veterans who were 30% or more disabled in 1985. Annual Report 1985, Veterans' Administration, p. 238, Table 60. Even more importantly, 194,134 of those veterans had dependents who were spouses or children. Limited only to the Vietnam era veterans, the VA's own statistics indicate that 111,756 disabled veterans had dependents who were spouses or children for the period of September, 1985. *Id.* The impact of preempting state authority regarding the support of these dependents is not the minimal impact implied by the figure of 27,263 apportionments.

B. 38 U.S.C.A. § 211(a) PROVIDES FINALITY ONLY FOR CERTAIN DECISIONS OF THE ADMINISTRATOR; IT DOES NOT ADDRESS THE PARALLEL SYSTEM OF STATE FAMILY LAW.

Both Mr. Rose and the Solicitor General cite 38 U.S.C.A. § 211(a) for the proposition that the Administrator has sole control over disability benefits. It provides that:

[t]he decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to

review any such decision by an action in the nature of mandamus or otherwise.

38 U.S.C.A. § 211(a). The only exclusivity that is established by this provision is the finality of "those decisions of law or fact that arise in the *administration* by the Veterans' Administration of a *statute* providing benefits for veterans." *Johnson v. Robinson*, 415 U.S. 361, 367, 94 S.Ct. 1160, 1166 (1974). (Emphasis in original). A decision was defined by the Court as being "under" the statute when it is made "by the Administrator in the interpretation or application of a particular provision of the statute to a particular set of facts" *Id.* Accordingly, the constitutional challenge to a veterans' statute in *Robinson* was not precluded from judicial review.

Subsequently, this seemingly straightforward language was reiterated in *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457 (1975). The constitutional challenges in *Robinson* were not precluded because:

. . . the question sought to be litigated was simply not within § 211(a)'s express language, and there was accordingly no basis for concluding that Congress sought to preclude review of the constitutionality of veterans' legislation.

Id. at 761, 762, 95 S.Ct. at 2465.

In the context of alleged violations of the Administrative Procedures Act by the Veterans' Administration, the United States Court of Appeals for the District of Columbia raised, *sua sponte*, the question of jurisdiction for judicial review under § 211(a). *Gott v. Walters*, 756 F.2d 902 (D.C. Cir. 1985), *vacated and reh'g. granted* 791 F.2d 172 (D.C. Cir. 1985). Judge Scalia extrapolated from *Robinson* and other decisions the following:

Thus, issues of law not decided by the Administrator (*Robinson*) are excluded; as are issues of law decided by the Administrator not in the course of a determination under the veterans' benefit laws, but in the course of applying independently operative statutes

756 F.2d at 907.

Similarly, other courts have noted the inapplicability of § 211(a) to child support. As the court stated in *In re Gardner*, 220 Wis. 493, 264 N.W. 643 (1936):

While an order of the administrator is final, its effect merely is that no court can adjudge the administrator to make any greater or different allotment. It does not prevent application of the accumulated fund to the payment of accrued support money under the divorce judgment.

264 N.W. at 646. The express language of the statute simply does not address the authority of state courts to order child support payments which are based in part upon a veteran's disability benefits. Neither does it address the court's ability to enforce those orders. Many states expressly consider veterans' benefits when determining the proper amount of alimony or child support to order. *See, e.g., Parker v. Parker*, 335 Pa. Super. 348, 484 A.2d 168 (1984); *Cohen v. Murphy*, 368 Mass. 144, 330 N.E.2d 473 (1975); *Mims v. Mims*, 442 So.2d 102 (Ala. Civ. App. 1983); *Pishue v. Pishue*, 32 Wash.2d 750, 203 P.2d 1070 (1949); *Hannah v. Hannah*, 191 Ga. 134, 11 S.E. 2d 779 (1940). In addition, state and federal courts have also considered other federal benefits when determining the proper amount of alimony or child support to be paid. *See, e.g., Operating Engineers v. Zamborsky*, 650 F.2d 196

(9th Cir. 1981) (ERISA); *Baker v. Baker*, 421 A.2d 998 (N.H. 1980) (Military Retirement); *Meadows v. Meadows*, 619 P.2d 598 (Okla. 1980) (Social Security Disability). See generally Annot., 22 A.L.R.2d 1421 (1952).⁵

Moreover, state court-ordered child support does not frustrate the two goals underlying 38 U.S.C.A. § 211(a) which this Court discussed in *Johnson v. Robinson*:

(1) To insure that veterans' benefits claims will not burden the courts and the Veterans' Administration with expensive and time-consuming litigation, and (2) to insure that the technical and complex determinations and applications of Veterans' Administration policy connected with veterans' benefits decisions will be adequately and uniformly made.

415 U.S. at 370, 94 S.Ct. at 1167 (footnotes omitted). Likewise, the state court decision in the instant case does not contravene the purposes of § 211(a). The analysis of legislative history in *Johnson v. Robinson*, 415 U.S. at 371, 373, 94 S.Ct. at 1167-68; and *Gott v. Walters*, 756 F.2d at 908-909, reflects that the current language of § 211(a):

was enacted to overrule the interpretation of the Court of Appeals for the District of Columbia Circuit, and thereby restore vitality to the two primary purposes to be served by the no-review clause.

⁵In addition to the *Robinson* and *Gott* type of analysis concluding the inapplicability of § 211(a), several courts have fashioned exceptions to its coverage, generally permitting judicial review as to rulemaking or as to the limits of the Veterans' Administration's statutory authority. See e.g., *Wayne State University v. Cleland*, 590 F.2d 627 (6th Cir. 1978); *aff'd. in part, rev'd. in part on other grounds*, 473 F.Supp. 8 (S.D. Mich. 1979); *Merged Area X v. Cleland*, 604 F.2d 1075 (8th Cir. 1979); *Evergreen State College v. Cleland*, 621 F.2d 1002 (9th Cir. 1980); *University of Maryland v. Cleland*, 621 F.2d 98 (4th Cir. 1980).

415 U.S. at 373, 94 S.Ct. at 1168. The House Report for the Committee on Veterans' Affairs noted that the declaratory judgment decisions of the Court of Appeals for the District of Columbia⁶ had resulted in numerous federal district court lawsuits "seeking a resumption of terminated benefits." 415 U.S. at 371, 94 S.Ct. at 1168. Both the House Report, H.R. Rep. 91-1166, 91st Cong. 2d Sess. 10, reprinted in 1970, U.S. Code Cong. & Ad. News, 3730, and a letter of the Administrator to the Committee, *id.*, at 21, 24, 1970 U.S. Code Cong. & Ad. News, 3740, 3743, express concern for federal district court lawsuits seeking review of Veterans' Administration decisions terminating or reducing benefits. Clearly, Congress's concern that the courts might be burdened referenced the 353 lawsuits that had been filed in the District of Columbia Circuit as of March 8, 1970. See *Johnson v. Robinson*, 415 U.S. at 372, 94 S.Ct. at 1168.

By contrast, the Tennessee child support order in the instant case does not involve review of any decision of the Administrator. Child support issues are routinely considered in state trial courts without involvement of or consequences for the Veterans' Administration. Child support cases do not raise factual issues concerning the technical and complex determinations and applications of Veterans' Administration policy. Consistent with the facts in *Johnson*,⁷ no challenge to any administrative factual de-

⁶See, e.g., *Wellman v. Whittier*, 259 F.2d 163 (D.C. Cir. 1958); *Thompson v. Gleason*, 317 F.2d 901 (D.C. Cir. 1962); *Tracy v. Gleason*, 379 F.2d 469 (D.C. Cir. 1967).

⁷Indeed, there was more of a nexus to the Veterans' Administration in *Johnson* than in the instant case since appellee Robinson's application for educational assistance had been denied by the Veterans' Administration and the Administrator of Veterans' Affairs. 415 U.S. at 363, 94 S.Ct. at 1164.

termination or application of Veterans' Administration law was raised in the state trial proceedings, nor is any raised now. Neither appellant nor the United States as *amicus curiae* raise any administrative determinations of fact or law whose finality is challenged by the state court proceedings.

C. CHILD SUPPORT ORDERS ARE NOT PRE-EMPTED BY 38 U.S.C.A. § 3101.

It is argued that 38 U.S.C.A. § 3101(a) prohibits the child support order in this case. That statute states:

(a) Payments of benefits due or to become due under any law administered by the Veterans' Administration shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments

38 U.S.C.A. § 3101(a).

Congress, in a 1976 revision of 38 U.S.C.A. § 3101, indicated that this section serves two purposes: it avoids the possibility of the Veterans' Administration being used as a collection agency and it prevents the deprivation and depletion of the means of subsistence of veterans dependent upon these benefits as their main source of income. S. Rep. No. 1243, 94th Cong., 2d Sess. 147, 148, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5369, 5370. These goals

are not frustrated by a state court's consideration of these funds when ordering child support. The Court's order in no way involves the Veterans' Administration. The disability benefits continue to be sent to the veteran. Compliance with the Court's order would not deplete the means of the veterans' support, for the Court considers the veterans' needs as well. Tenn. Code Ann. § 36-5-101(e)(3). Additionally, it must be remembered that the beneficiaries of these benefits include the dependents of the veteran. Consequently, if the veteran should use some of these funds for the children's support, it cannot be said that they are being diverted from their purpose. By law in virtually every state, the parent is obligated to support his or her children. *See e.g.*, Tenn. Code Ann. § 34-1-101. "Disability does not relieve him of that obligation, though it may affect the extent to which he can perform it." *Schlaeffer v. Schlaeffer*, 112 F.2d 177, 184 (D.C. Cir. 1940). "[T]he usual purpose of exemptions is to relieve the person exempted from the pressure of claims hostile to his dependents' essential needs as well as his own personal ones, not to relieve him of familial obligations. . . ." *Id.* at 185.

The veterans' disability benefits are intended to provide relief from the diminished earning capacity of veterans disabled due to their military service. *In re Marriage of Hapaniewski*, 107 Ill. App. 3d 848, 438 N.E.2d 466 (1982); H.R. Rep. No. 1155, 96th Cong., 2d Sess. 1, 4, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3307, 3310. The funds provided help replace those lost as a consequence of the decreased earning capacity. *In re Marriage of Tibbles*, 63 Or. App. 774, 665 P.2d 1267 (1983). The exemption protects the recipient of the funds and affords a degree of security to the family and dependents of the

recipient. *Parker v. Parker*, 335 Pa. Super. 348, 484 A.2d 168 (1984); *Oklahoma ex rel. Eastern State Hospital v. Beard*, 600 P.2d 324 (Okla. 1979); *In re Flanagan*, 31 F. Supp. 402 (D.D.C. 1940). "The theme of the 'military family' and its importance to military life is widespread and well publicized." S. Rep. No. 502, 97th Cong., 2d Sess. 26, 42, reprinted in 1982 U.S. Code Cong. & Ad. News 1611, 1627. Such anti-attachment provisions afford security to the family by ensuring that the benefits actually reach the beneficiary. *Hisquierdo v. Hisquierdo*, 439 U.S. at 584, 99 S.Ct. at 809.⁸ The mere fact that 38 U.S.C.A. § 3107(a) permits "[a]ll or any part of," the benefits to be apportioned likewise indicates that the benefits are not considered by Congress to be exclusively for the veteran.

The purpose of the exemption provision in 38 U.S.C.A. § 3101 "has been variously stated to insure . . . [the veteran] and his family a safe, although modest maintenance so long as their needs required it", and "to protect not only the recipient of the benefits but also to afford some degree of security to the family . . . [and] to insure the public against pauperism of the recipient of the benefits or that of his dependents". *In Re Guardianship of Weinberg*, 201 Misc. 489, 110 N.Y.S.2d 130, 135 (1952) [citing *Yates County National Bank v. Carpenter*, 119 N.Y. 550, 555, 23 N.E. 1108, 1109 (1890) and *In Re Flanagan*, 31 F.

⁸In *Lawrence v. Shaw*, 300 U.S. 245, 57 S.Ct. 443 (1937), the United States Supreme Court indicated "These payments are intended primarily for the maintenance and support of the veteran." 300 U.S. at 250, 57 S.Ct. at 445. The court's use of the word "primarily" indicates that other purposes also exist. *In re Bagnall's Guardianship*, 238 Iowa 905, 29 N.W.2d 597 (1947). Clearly one of the most important of these purposes is to help the veteran fulfill his obligation to support his children.

Supp. 402, 403 (D.D.C. 1940)]. See also *Andrew v. Colorado Savings Bank*, 205 Iowa 872, 219 N.W. 62 (1928) (in construing the predecessor to 38 U.S.C.A. § 3101 the Iowa Supreme Court said "... that for the good of mankind, there are instances when it is best that creditors go unpaid in order that certain individuals in society may have a particular source of income dedicated to personal or family subsistence, maintenance and enjoyment.") Congress itself in enacting the Uniformed Services Former Spouses Protection Act stressed the importance of the military family and acknowledged the need for protecting it, even after divorce. See S. Rep. No. 502, 97th Cong., 2d Sess. 57, reprinted in 1982 U.S. Code Cong. & Ad. News 1596-1640.

Three areas of exemption are established by 38 U.S.C.A. § 3101—from taxation, from claims of creditors and from attachment, levy or seizure. Clearly, taxation is not involved in this case. Nor is a creditor of Mr. Rose before this court. The ordinary meaning of the word "creditor" does not include this situation. The obligation of a father to support his children is not a "debt" such as would establish a debtor-creditor relationship with his children. *Donovan v. Donovan*, 15 Mass. App. 61, 443 N.E.2d 432 (1982); *Gaskins v. Security-First National Bank of Los Angeles*, 30 Cal. App.2d 409, 86 P.2d 681 (1939); *Dillard v. Dillard*, 341 S.W.2d 668 (Tex. Civ. App. 1960).

This Court has also recognized that child support is not a debt in the ordinary sense. In *Wetmore v. Markoe*, 196 U.S. 68, 25 S.Ct. 172 (1904), this Court was asked to determine a husband's financial obligation as to court or-

dered alimony and child support after his discharge in bankruptcy. The discharge predated the provision of the Bankruptcy Act which excepts alimony and child support from discharge. The Court stated that:

[A] decree awarding alimony to the wife or children, or both, is not a debt which has been put in the form of a judgment, but is rather a legal means of enforcing the obligation of the husband and father to support and maintain his wife and children. He owes this duty, not because of any contractual obligation, or as a debt due from him to the wife, but because of the policy of the law which imposes the obligation upon the husband.

196 U.S. at 74, 25 S.Ct. at 174. This obligation, noted the Court, came from the common law. The nationwide importance of this obligation was acknowledged when the Court said, "We may assume this obligation to exist in all states." ¹ *Id.*, at 75, 25 S.Ct. at 175. The obligation to pay child support for one's children, determined the Court, "is not a debt in any just sense." *Id.*, at 76, 25 S.Ct. at 175.

Congress, too, has recognized this obligation. When discussing the dependency and indemnity compensation for survivors of veterans who died of service-connected causes, a 1980 report stated:

The purpose of this benefit is to provide partial compensation to the designated survivors for the loss in financial support sustained as the result of the service-connected death. Income and need are not factors in determining a surviving spouse's or child's entitlement since the Nation assumes, in part, the legal and moral obligation of the veteran to support the spouse and children.

H. R. Rep. No. 1155, 96th Cong., 2d Sess. 1, 7, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3307, 3313.

Likewise, the third exemption, from attachment, levy or seizure, is not applicable to this case. Section 3101(a) was enacted by Congress in the Act of August 12, 1935, ch. 510, § 3, 49 Stat. 609. It combined two earlier acts. The phrase "shall [not] be liable to attachment, levy or seizure by or under any legal or equitable process whatever" was taken from the Act of March 3, 1873, ch. 234, § 33, 17 Stat. 575. Additionally, this provision was included without change in the consolidation of all laws administered by the Veterans' Administration in the Veterans' Benefits Act of 1957, Pub. L. No. 85-56, 71 Stat. 89, and in the Act of 1958, Pub. L. No. 85-857, 72 Stat. 1229. In 1976, 38 U.S.C.A. § 3101 was amended to prohibit the assignment of veterans' benefits checks to educational institutions. Veterans' Education and Employment Assistance Act of 1976, P.L. 94-502, § 701, 90 Stat. 2883, 2405 (1976).

Congress is presumed to be aware of prior judicial constructions of the statutes' language and to adopt that interpretation when it re-enacts a statute without change. *Lorillard v. Pons*, 434 U.S. 575, 98 S.Ct. 866 (1978); *Smolin v. First Fidelity Savings and Loan Ass'n.*, 238 Md. 386, 209 A.2d 546, 549 (1965). Prior to the time that Congress passed this statute in 1935 and prior to its reenactment in 1957, there were several judicial constructions of this statute holding that alimony and child support obligations of a veteran were not debts and were not subject to the exemption provisions in 38 U.S.C.A. § 3101(a). *Smolin v. First Fidelity Savings and Loan Ass'n.*, 238 Md. 386, 209 A.2d

546, 549 (1965) (footnotes omitted). See also *Voelkel v. Tohulka*, 236 Ind. 588, 141 N.E.2d 344 (1957), *cert. denied*, 355 U.S. 891, 78 S.Ct. 263 (1957).⁹ Congress must be presumed to have been aware of these prior decisions and to have approved of this exception.

Construing the goals of 38 U.S.C.A. § 3101 and the 1976 amendment together, it is clear that the purposes of § 3101 are not violated by the Tennessee Court's consideration of Mr. Rose's veteran's benefits as a source of income in determining a child support award. The Court did not award a direct interest in Mr. Rose's benefits, nor did the order provide for a direct mailing of Mr. Rose's benefit check from the Veterans' Administration to Mr. Rose's children. Therefore this situation does not constitute the type of prohibited assignment at issue in the 1976 Act. It follows, then, that the Veterans' Administration is not being placed in the position of a collection agency. In addition, despite the fact that Mr. Rose's net disposable source of income could be diminished as a result of compliance with the child support order, case law subsequent to the 1976 revision has expressly stated that § 3101 would not be violated by a court's consideration of veterans' benefits as a source of income from which a support obligation may be ordered, even where the veteran's sole source of income was veterans' benefits. See *Mims v. Mims*, 442

⁹Many courts have held that the exemptions contained in 38 U.S.C.A. § 3101 and its predecessors do not apply to child support obligations. *In re Gardner*, 220 Wis. 493, 264 N.W. 643 (1936); *Gaskins v. Security First Nat'l. Bank of Los Angeles*, 30 Cal. App.2d 409, 86 P.2d 681 (1939); *Pishue v. Pishue*, 32 Wash. 2d 750, 203 P.2d 1070 (1949); *McCarthy v. Brainard*, 6 A.D.2d 1029, 178 N.Y.S.2d 403 (1958); *Dillard v. Dillard*, 341 S.W.2d 668 (Tex. Civ. App. 1960).

So.2d 102 (Ala. Civ. App. 1983); *Collins v. Collins*, 458 So.2d 1008 (La. App. 1984). The amount of the benefits was merely considered by the trial court as part of Mr. Rose's income when it determined the appropriate amount of child support to be ordered. *Mims v. Mims*, 442 So.2d 102; *Cohen v. Murphy*, 368 Mass. 144, 330 N.E.2d 473 (1975); *In re Marriage of Tibbles*, 63 Or. App. 774, 665 P.2d 1267 (1983); *Parker v. Parker*, 335 Pa. Super. 348, 484 A.2d 168 (1984); *In re Marriage of Hapaniewski*, 107 Ill. App.3d 848, 438 N.E.2d 466 (1982).

Common sense and basic concepts of fairness dictate that the funds that a parent receives should be considered by the court in assessing his ability to pay child support. The interests of the child are paramount. "[I]t is the policy of the law to make all of a husband's resources available for the support of his family." *Pennsylvania v. Vogelsong*, 311 Pa. Super. 507, 457 A.2d 1297 (1983). A Court may "exert reasonable pressure, including an adjudication of contempt, to encourage the contemtor to exercise ingenuity in managing his affairs so as to fulfill his paramount support obligations." *Krokyn v. Krokyn*, 372 Mass. 206, 390 N.E.2d 733, 737 (1979). Tennessee courts expect a father to use ingenuity and to sacrifice if necessary to provide for his children. *Harwell v. Harwell*, 612 S.W.2d 182 (Tenn. App. 1980).

It is a cardinal principle of statutory construction that statutes should be interpreted to avoid unreasonable results whenever possible. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 102 S.Ct. 1534 (1982). It is patently unreasonable to believe that Congress intended to immunize a disabled veteran who is receiving \$43,248.00 year-

ly in tax exempt benefits as well as a variety of other benefits, from having to fulfill his child support obligations. This is even clearer when it is recognized that the benefits are intended to aid the beneficiary and the beneficiary's dependents. The federal laws should not be made "an instrument to deprive dependent wife and children of the support and maintenance due them from the husband and father, which it has ever been the purpose of the law to enforce." *Wetmore v. Markoe*, 196 U.S. at 77, 25 S.Ct. at 175-76 (1904).

D. THE FACT THAT FEDERAL LAW PROHIBITS GARNISHMENT OF DISABILITY BENEFITS HAS NO BEARING ON THE ENFORCEABILITY THROUGH CONTEMPT OF THE STATE COURT'S CHILD SUPPORT ORDER.

Appellant attaches great importance to the fact that federal law does not permit garnishment of veteran's disability benefits. From this fact, he infers an intent on the part of Congress that the veteran's benefits apportionment procedure is exclusive and that the state courts may not consider the veteran's benefits when determining the proper amount of the veteran's child support obligation. Appellant's inferences are not justified by the legislative history of the garnishment provisions. Enforcement of court ordered support through traditional contempt powers does not constitute garnishment.

In 1974, Congress enacted the Social Services Amendments of 1974. Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(a), 88 Stat. 2337, 2739, 2740. Section 101(a) of this act was codified as 42 U.S.C.A. § 659(a). This provision permits moneys, the entitlement to which

is based on remuneration for employment, due from or payable by the United States to any individual to be subject to garnishment or attachment brought for the enforcement of the individual's child support or alimony obligations. The report of the Senate Committee on Finance, S. Rep. No. 1356, 93d Cong. 2d Sess. 1, *reprinted in* 1974 U.S. Code Cong. & Ad. News 8133, reports that "[t]he problem with welfare in the United States is, to a considerable extent, a problem of the nonsupport by their absent parents . . . all children have the right to receive support from their fathers," S. Rep. No. 1356 at 14, 1974 U.S. Code Cong. & Ad. News at 8146. The report flatly states, "The enforcement of child support obligations is not an area of jurisprudence about which this country can be proud." *Id.*

The Committee recommended the bill for passage with an amendment.

While the Committee bill leaves basic responsibility for child support and establishment of paternity to the State, it also envisions a far more active role on the part of the Federal government in monitoring and evaluating State programs, in providing technical assistance, and, in certain instances, in undertaking to give direct assistance to the States in locating absent parents and obtaining support payments from them.

Id. at 8150. In the portion of the report regarding attachment of federal wages, the Committee noted that state officials had recommended the enactment of legislation permitting the garnishment and attachment of federal wages and other obligations, such as tax refunds, where a support order or judgment existed. At that time, the law did not permit such attachments, apparently due to the sovereign immunity of the United States. *Id.* at 25, 1974

U.S. Code Cong. & Ad. News at 8157. Thus, the Committee specifically recommended permitting garnishment, for child support and alimony cases, of the wages of federal employees as well as attachment of annuities and other payments under federal programs in which entitlement is based on employment. *Id.*

The Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, § 501, 91 Stat. 126, 159, enacted the provision that became 42 U.S.C.A. § 662(f)(2), which defines the entitlements deemed to be "based upon remuneration for employment" for the purpose of garnishing federal wages. It specifically excludes "any payments by the Veteran's Administration as compensation for a service-connected disability. . . ." 42 U.S.C.A. § 662(f)(2). This provision is merely a clarification of the 1974 law. See H.R. Conf. Rep. No. 263, 95th Cong. 1st Sess., 23, 25, reprinted in 1977 U.S. Code Cong. & Ad. News 287, 300.

The intent of the 1974 act was to provide federal assistance to the state in enforcing child support obligations. The basic responsibility for child support enforcement was left with the state. Appellant's interpretation of this act would make the act a complete barrier to the state's ability to enforce a disabled veteran's child support obligation. There is nothing in the statute or the legislative history that even suggests such an intent.

The fact that garnishment and attachment are only permitted for moneys to which an individual is entitled because of remuneration for employment has no real bearing on the case before this Court. The legislative history clearly demonstrates that the states were to remain primarily responsible for child support matters and that the

federal law was intended to be an aid to the states. The fact that Congress did not go as far as it could have does not mean that it withdrew from state consideration funds excluded from the garnishment provisions. *Meadows v. Meadows*, 619 P.2d 598 (Okla. 1980). Likewise, the fact that Congress did not authorize garnishment does not mean that it prohibited the exercise of a state court's contempt power. One possible reason veterans disability benefits are exempted from garnishment is suggested by the act itself—Congress only wanted to permit garnishment of moneys due as remuneration for employment. The trouble and administrative expense of complying with a garnishment is only justified where the government has recently received something of value, work, from the individual being garnished.

IV. PRIOR SUPREME COURT DECISIONS ON COMMUNITY PROPERTY DO NOT SUPPORT PREEMPTION OF STATE CHILD SUPPORT LAWS.

Appellant relies heavily on this Court's decisions in *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S.Ct. 802 (1979), and *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728 (1981). *Hisquierdo* held that benefits payable under the Railroad Retirement Act could not be divided under California's community property law. Similarly, *McCarty* held that federal law prohibited California from dividing military retired pay pursuant to state community property laws. The case is clearly distinguishable from *Hisquierdo* and *McCarty* because it involves the obligation to pay child support, not a community property claim. Both Congress and this Court in *Hisquierdo* distinguished child

support and alimony claims from those of community property. In 1977, Congress added a definitional statute to the Social Security Act¹⁰ which states that alimony excludes "any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property or other divisions of property. . . ." 42 U.S.C.A. § 662. Justice Blackmun, writing for the majority in *Hisquierdo*, concluded " . . . that Congress in adopting . . . [the 1977 amendments] thought that a family's need for support could justify garnishment, even though it deflected other federal benefit programs from their intended goals, *but that community property claims, which are not based on need*, could not do so." 439 U.S. at 587, 99 S.Ct. at 811 (emphasis added). Similarly, this Court noted in *McCarty* and in *Wissner v. Wissner*, 338 U.S. 655, 70 S.Ct. 398 (1950), that child support is based on need while a community property claim is not. Finally, both *Hisquierdo* and *McCarty* are based on Congressional intent to preempt state law, whereas no such intent is present in this case.

Moreover, it would appear that this Court's interpretations of the statutes involved in *Hisquierdo* and *McCarty* have been undercut by subsequent Congressional enactments. The legislative history of the Uniformed Services Former Spouses Protection Act, Pub. L. No. 97-252, § 1002, 96 Stat. 718, 730-734 (1982), unequivocally states rejection of *McCarty*:

¹⁰Tax Reduction Simplification Act of 1977, Pub. L. No. 95-30, § 501(d), 91 Stat. 126, 160 (1977), codified as 42 U.S.C.A. § 662(c).

The primary purpose of the bill is to remove the effect of the United States Supreme Court in *McCarty v. McCarty*, 453 U.S. 210 (1981). The bill would accomplish this objective by permitting Federal, State, and certain other courts, consistent with the appropriate laws, to once again consider military retired pay when fixing the property rights between the parties to a divorce, dissolution, annulment or legal separation.

S. Rep. No. 502, 97th Cong., 2d Sess. 26, 42, *reprinted in* 1982 U.S. Code Cong. & Ad. News 1611, 1627. [codified as amended at 10 U.S.C.A. § 1408(c)(1), (a)(4)].

Likewise, *Hisquierdo* may have been eroded by enactment of two subsequent amendments to the Railroad Retirement Act. These amendments are the Omnibus Budget Reconciliation Act of 1981 (Retirement Act by the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 35F) and the Railroad Solvency Act of 1983 [Pub. L. No. 98-76, 97 Stat. 411, § 419(a)(5)]. The latter clarified that the anti-attachment provisions of the Railroad Retirement Act of 1974, § 231(m), 45 U.S.C.A. § 231(m):

. . . [do] not operate to prohibit the characterization or treatment of that portion of an annuity under this subchapter . . . as community property for the purposes of, or property subject to, distribution in accordance with a court decree of divorce, annulment, or legal separation or the terms of any court-approved property settlement incident to any such court decree.

* * *

45 U.S.C.A. § 231(m). Quirk, *State Community Property Laws: Coping with Federal Tax and Pension Laws*, 19 Conzaga L. Rev. 481, 492, 498-99 (1983/84).

The Solicitor General and the appellant have suggested that pre-emption is necessary in this case because the state child support laws frustrate the federal purposes of providing support for the disabled veteran and enabling the country to maintain a youthful and vigorous military force by maintaining incentives for military service that disability programs provide. An examination of these justifications show that they are without merit.¹¹

The purpose of disability benefits is to provide relief from the diminished earning capacity of veterans disabled due to military service. H.R. Rep. No. 1155, 96th Cong., 2d Sess. 1, 4, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3307, 3310. These benefits are therefore clearly for the veteran and his dependents, since the earnings he would have had but for the disability would certainly have been applied for the benefit of the veteran and his dependents. Thus, the appellant and the Solicitor General have interpreted the purpose of the benefits too narrowly.

A state court's consideration of these benefits when ordering the proper amount of child support would in no way undermine the country's ability to maintain a youthful and vigorous military force. If this were the case, then the consideration of military pay when a court is determining the proper amount of child support would be

¹¹In addition to personnel management purposes, the Solicitor General has cited the importance of disability benefits in avoiding the possibility that local communities become burdened with support of disabled veterans. (Brief of Solicitor General, footnote 5 pp. 5-6). Those same communities will, however, in many instances be burdened with public assistance payments to the dependents of disabled veterans if state courts are determined to be without power to enforce court orders of financial support against such veterans.

vastly more detrimental to military recruitment. There is certainly no evidence of concern about a detrimental effect on military recruitment in the legislative history of the act permitting military pay to be garnished for child support and alimony purposes. Indeed, the Senate Report in the Uniformed Services Former Spouses Act expressly rejected this line of argument in responding to *McCarty*.¹²

Moreover, application of the preemption doctrine to payment of child support obligations could encourage "manipulation problems" similar to those reviewed in *Yiatchos v. Yiatchos*, 376 U.S. 306, 309, 84 S.Ct. 742, 745 (1964), and *Free v. Bland*, 369 U.S. 663, 82 S.Ct. 1089 (1962). See *Hisquierdo*, 439 U.S. 583, 99 S.Ct. 809. In

¹²The Senate Report provided:

[T]he Department of Defense has not submitted any satisfactory empirical evidence based on reasonable or realistic assumptions concerning divorce proceedings in the State courts to show that during the period prior to the *McCarty* decision, recruiting, retention and personnel assignment were adversely affected by application of State property laws to military retired pay.

• • •

Based on these considerations and the record developed in the hearings, the committee believes that returning to the State courts—with certain limitations—the discretion to deal with military retired pay in divorce cases is a sound prescription for the admitted problems created by the *McCarty* decision. The committee cannot conclude that this approach would be so detrimental to military manpower management as to warrant retaining the fundamental result of the *McCarty* decision—that the courts are barred from considering military retired pay in dividing property in a divorce case.

S. Rep. No. 502, 97th Cong., 2d Sess. 7-9, *reprinted in* 1982 U.S. Code Cong. & Ad. News, 1601-1603.

both *Viatchos* and *Free*, this Court refused to permit federal preemption principles to work a fraud upon a wife's property rights. See also *Pishue v. Pishue*, 32 Wash.2d 750, 203 P.2d 1070, 1073 (1949) (Veterans' Administration rules should not be allowed to work an injustice); *Schlaef-er v. Schlaef-er*, 112 F.2d 177, 185 (D.C. Cir. 1940) (disability provisions of federal Life Insurance Act for the District of Columbia should not be interpreted to permit evasion of a man's familial obligations).

The generalized proscriptions of the federal laws are not sufficient to infer an intent on the part of Congress to pre-empt the historic, traditional and significant obligation of a parent to support children. From the foregoing analysis, it is clear that Congress has not pre-empted "by direct enactment" the state law involved in this case. Rather, Congress has established a relatively easy method by which the administrator may give all or part of the disability benefits to the children. The federal scheme does not purport to exempt the veteran from his obligation to pay child support. It certainly does not preclude the state court from considering the amount of disability benefits being received by the veteran when determining the appropriate amount of child support to be ordered, nor does it preclude other methods of enforcing that order, such as a finding of contempt.

CONCLUSION

The decision of the Tennessee Court of Appeals should be upheld.

Respectfully submitted,

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BRIEF

8

No. 85-1206

Supreme Court, U.S.
FILED

OCT 15 1986

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CHARLIE WAYNE ROSE, APPELLANT

vs.

BARBARA ANN McNEIL ROSE AND
THE STATE OF TENNESSEE,
APPELLEES

ON APPEAL FROM THE COURT OF APPEALS
OF TENNESSEE, EASTERN DIVISION

BRIEF FOR APPELLEE, BARBARA ANN McNEIL ROSE

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QUESTION PRESENTED FOR REVIEW

Whether state courts have jurisdiction to order child support payments to be made primarily from veteran's disability benefits.

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No. 85-1206

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October Term, 1985

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ON APPEAL FROM THE COURT OF APPEALS OF TENNESSEE,
EASTERN DIVISION

BRIEF OF BARBARA ANN McNEIL ROSE

Appellee, Barbara Ann McNeil Rose, (hereinafter Mrs. Rose) respectfully prays that this Court affirm the Judgment of the Court of Appeals for the Eastern Section of Tennessee, which affirmed the decision of the Circuit Court for Washington County, Tennessee (Honorable Jack R. Musick, Judge) entered on October 8, 1984 and October 29, 1984.

COUNTERSTATEMENT OF THE CASE

Barbara Rose obtained a divorce from Charlie Rose on October 25, 1983, and as a part of the Divorce Decree, Mr. Rose was ordered to pay child support in the amount of \$800.00 per month for the parties' two minor children.

Mrs. Rose was unemployed at the time of the divorce, while Mr. Rose was receiving approximately \$3,500.00 per month from Social Security and the Veteran's Administration for his disability. (J.S. 8a).

Mr. Rose paid the support until March, 1984, at which time he refused to pay any support beyond the ninety-four dollar per month directly allotted as "child support" and declared his disability benefits exempt from his child support obligations.

Mrs. Rose filed a Petition for Contempt against Mr. Rose, and the Trial Court ruled the Tennessee support statute, 36-5-101, was

constitutional and that Mr. Rose was to continue to pay child support in the amount of \$800.00. (J.S. 14a, 18a).

The Tennessee Court of Appeals, Eastern Section, affirmed the trial judge's Order setting the child support in the amount of \$800.00 per month, remanding the case to give Mr. Rose credit for the \$90.00 per month paid to Mrs. Rose on behalf of the children. (J.S. 4a).

SUMMARY OF ARGUMENT

The courts below correctly decided that the state courts had jurisdiction to order the Appellant, Charlie Rose, to pay child support largely from veteran's disability funds received by Rose.

State courts properly maintain jurisdiction and control over domestic relations matters; there is no intrusion into exclusive federal matters where the issue of child support comes into possible conflict with federal exemption statutes.

The federal exemption statutes that are found at 38 U.S.C. 3101 provide exemption from creditors. However, the obligation to pay child support is not a debt within the meaning of the statutory language.

Prior cases dealing with the issue of exemption of benefits as applied to child support have consistently held there is no

exemption for setting and enforcing child support. Wissner v. Wissner 338 U.S. 655 (1950)

ARGUMENT

I. STATE COURTS HAVE THE AUTHORITY AND CONTROL OVER QUESTIONS INVOLVING DOMESTIC RELATIONS MATTERS.

In the case of Hisquierdo vs. Hisquierdo, 439 U.S. 572 (1979), the clear ruling of the Court was that in matters of domestic relations, the state laws control in the interaction with federal laws unless there is "major damage to clear and substantial federal interest". 439 U.S. at 581.

Cases dealing with child support issues in possible conflict with federal statutes have almost unanimously left the matters of child support to the states.

The cases that have found a violation of the supremacy clause in the areas of domestic relations matters have dealt with specific

issues not involving child support, including a division of property in community property states, as is found in McCarty vs. McCarty, 453 U.S. 210 (1981); In Re Paniewski, 438 N.E. 2d 466 (Illinois 1982); Rickman vs. Rickman, 605 P. 2d 909 (Arizona 1980). In fact, the Court in Rickman vs. Rickman, held that the veteran's disability benefits were not community marital property, but found that the case should be remanded to the trial court to set spousal support and maintenance and child support, "bearing in mind that the appellant had income from disability benefits" at page 912.

This Court has held that the exemptions do not apply to support cases. In Wissner vs. Wissner, 338 U.S. 655 (1950), the Court held that the exemptions available to pensions and veteran's relief did not apply where alimony or support to wife and children was the issue.

Tennessee follows the rule that allows otherwise exempt funds (military retirement pay) to be considered for support matters, but not in division of jointly owned property. Whitehead vs. Whitehead, 627 S.W. 2d 944 (Tenn. 1982).

There is no major damage to clear and substantial federal interests in allowing federal benefits to be used to meet familial obligations. Western Electric Company vs. Traphagen, 400 A. 2d 66 (N.J. 1979).

The state courts have almost unanimously approved the setting of child support from veteran's disability benefits and other benefits otherwise excepted from execution. Meadows vs. Meadows, 619 P. 2d 598 (Oklahoma 1980); Cohen vs. Murphy, 330 N.E. 2d 473 (Mass. 1975); Pishue vs. Pishue, 203 P. 2d 1070 (Wash. 1949).

- II. THE FEDERAL STATUTORY SCHEME AS SET FORTH IN 38 U.S.C. 3101(a) DOES NOT PRECLUDE A STATE COURT FROM SETTING CHILD SUPPORT WHICH WILL, IN PART, BE PAID FROM VETERAN'S DISABILITY BENEFITS, SINCE THE VETERAN'S BENEFITS THEMSELVES ARE TO BE USED FOR THE SUPPORT OF THE VETERAN AND HIS DEPENDENT CHILDREN.

The purposes of the statutes authorizing the veterans' exemption from garnishment and execution are to see that the veteran and his dependents are supported. 38 U.S.C. 3101(a) creates an exemption to prevent creditors of the veteran from seizing these assets to satisfy debts. Courts have routinely held that the obligation to pay child support is not a debt in the usual sense, but is an obligation growing out of the parental status and public policy. (J.S. App. 4a).

The clear intention of the federal statutes is to offer support for children and dependents of veterans, and there is created in these statutes a procedure whereby children not in the

custody of the veteran may be given an apportionment of the benefits by the administrator of the Veteran's Administration. 38 U.S.C. 3107(2). The use of the language "may be apportioned" shows that the relief granted within the statute is an optional and not mandatory type relief. The apportionment may be made only when the veteran is not otherwise reasonably discharging his responsibility for the childrens' support. 38 C.F.R. Section 3.450(a)(1)(2i). In this case, the federal statutes offer a form of relief, additional to the traditional form of relief of contempt for willful failure or refusal to pay child support.

Even if the veteran's disability benefits are not subject to garnishment, as set forth in the federal exemption statutes, courts have held that an individual ordered to pay child support can still be held in contempt. Barbour vs. Barbour, 642 S.W. 2d 904 (Kentucky 1982).

The statutes that authorize an apportionment of veterans' disability benefits are not mandatory, and the remedy of apportionment does not preempt the common remedy of contempt.

Preservation of the state courts' power to enforce child support awards does not render compliance with the exemption of veterans' disability impossible, nor does it impede the fulfillment of the federal act's purposes and objectives.

The state courts' powers to enforce child support orders compliments the objective of the veterans' exemption statutes to provide support for the veteran and his dependents.

The result of the Appellant's argument is that multiple hearings in multiple forums would be required to set child support in a case like this, where the individual had both exempt and nonexempt assets. According to the statutes, no

appeal could be made from the Veteran's Administration Administrator. 38 U.S.C. 211(a).

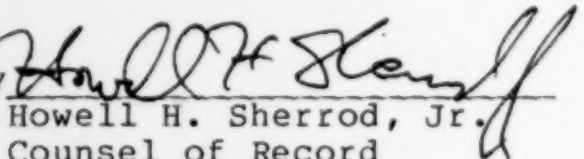
The trial judge who has the opportunity to hear all the relevant facts in considering the needs of the children and the total asset picture of the parties is in the best possible position to reach a fair decision concerning child support payments. That is why these federal statutes were not intended to override the state's interest in domestic relations matters.


CONCLUSION

For the foregoing reasons, the decision of the Tennessee Court of Appeals should be sustained.

Respectfully submitted,

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REPLY BRIEF

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12
No. 85-1206

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CHARLIE WAYNE ROSE,

APPELLANT,

VS.

BARBARA ANN MCNEIL ROSE, AND
THE STATE OF TENNESSEE

ON APPEAL FROM THE COURT OF APPEALS,
EASTERN SECTION OF TENNESSEE

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IN THE SUPREME COURT OF THE UNITED STATES

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THE STATE OF TENNESSEE

ON APPEAL FROM THE COURT OF APPEALS
OF TENNESSEE, EASTERN SECTION

REPLY BRIEF FOR APPELLANT¹

Appellees and opposing amici have concentrated largely on arguing propositions that are not disputed. Appellant recognizes, of course, "the presumption that Congressional Acts are not intended to interfere with state domestic relations law" except where the state law does "'major damage' to 'clear and substantial' federal interests" (Appellant's Br. 26 (citations omitted)).

¹This brief reflects the collaborative efforts of appellant and amicus United States.

Nor do we quarrel with the more specific assertion that a State should be able to "consider" the amount of income--including a veteran's disability benefits--which a former spouse receives when it sets child support payments. And we of course do not dispute the proposition that in general a divorced spouse may be required to support his children.

But none of these general propositions can decide this case. Indeed, in the special context of this case, these propositions are all beside the point. The state law here does threaten Congress's determination that veterans are to receive certain payments and that the payments are not to be reduced. Here the State has not simply "considered" these benefits, it has mandated that they are in part taken from appellant. And by providing that the funds it has set aside as necessary for appellant's care and bene-

fit cannot be taken from him by anyone but the Veterans Administration, Congress has not ignored or destroyed the general proposition that child support is a good thing, but has instead simply accommodated the more specific principle which must control in this case: that disabled veterans like appellant have rights, too, and that those rights are to be safeguarded by the Veterans Administration. Accordingly, the statutory scheme provides that the VA Administrator may apportion appellant's benefits--yet Ms. Rose has declined to ask him to do so.²

1. Appellees have utterly failed to refute the contention of appellant and the Solicitor General that the state court's order requiring Mr. Rose to make child

²In light of this failure, the objections of amici State of California, et al, (Br. 15-16) to the standards the Administrator has established to consider apportionment requests are clearly not the issue.

support payments from his VA disability benefits is contrary to Congress's enactments, and they have offered no convincing explanation of why *McCarty v. McCarty*, 453 U.S. 210 (1981), and *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), do not a fortiori control this case. There can be no doubt that "the right (to appellants' benefits) as asserted (by appellees) conflicts with the express terms of federal law and . . . its consequences sufficiently injure the objectives of the federal program (so as) to require nonrecognition." *Hisquierdo*, 439 U.S. at 583.

The State's response (Br. 15-22) to our argument that 38 U.S.C. 211(a) and 3107 demonstrate that Congress intended the Veterans' Administration to determine the apportionment of veterans' benefits misses the mark. That Section 3107 does not require the VA to make apportionments says nothing about whether Congress's decision empowering it to do so would be

undermined by allowing state courts to undo the VA's determination (see also, U.S. Br. 11 & n. 11); likewise, it is nowhere explained how state courts can determine the amount of benefits going to a veteran's children, and thus the amount of such benefits remaining to the veteran for his own use, without running afoul of Section 211(a)'s mandate that "(t)he decisions of the Administrator on any question of law or fact . . . providing benefits for veterans and their dependents . . . shall be final and conclusive." Congress's specificity in setting benefit levels in 38 U.S.C. 314 is not discussed by appellees at all.

State appellee's response to Congress's explicit decision to protect benefits from "attachment, levy or seizure by or under any legal or equitable process whatever," 38 U.S.C. 3101(a), is to say that "disability benefits (will) continue to be sent to the veteran. Compliance with the Court's order would not deplete the means of the

veteran's support, for the Court considers the veterans' needs as well" (State Br. 23 (citation omitted)). The unequivocal language in Section 3101(a) demonstrates that the veteran has the right to use his check, not just receive it even if someone else has "considered" his needs and found them to be less than Congress specified. The state's (Br. 25-28) exercise in cutting the language in Section 3101(a) into three parts and its contorted reading of each part cannot disguise the fact that the statute is evidently intended as a broad prohibition against any unauthorized attempt to take a disabled veteran's payments from him. See *Porter v. Aetna Casualty & Surety Co.*, 370 U.S. 159, 162 (1962) (exemption "should be liberally construed . . . to protect funds granted by Congress for the maintenance and support of the beneficiaries thereof)."

Equally unpersuasive is the State appellee's (Br. 30-33) response to Congress's decision to exclude veterans' benefits when it allowed other federal benefits to be subject to legal processes (42 U.S.C. 659(a), 662(f)(2)). Here again, the statute is hopelessly distorted by appellee's argument that holding appellant in contempt of court for not paying over the benefits is not "garnishment" (a term not used in the statute). *McCarty v. McCarty*, *supra*, and *Hisquierdo v. Hisquierdo*, *supra*, also involved no direct attempt to garnish federal benefits, nor any other state court order requiring the federal agency to make payment directly to the federal beneficiary's dependents, but that circumstance did not deter this Court from analyzing the practical effects of the state court orders. See also *United States v. Oregon*, 366 U.S. 643, 648-649 (1961). The broad and unequivocal language not only in Section 3101(a) but also in 42 U.S.C. 662(f)(2)

(benefits subject to legal process do not include "any payments by the Veterans' Administration for a service-connected disability or death" (emphasis added)) leaves no room for treating child support in this case differently from any other financial obligation--notably, the obligation to a former spouse in *Hisquierdo* and *McCarty*--or treating the contempt order here differently from any other judgment.

Finally, appellees stress the familiarity of the state court with the divorce proceedings and the Administrator's lack of expertise with child custody issues (*Rose* Br. 11; *State* Br. 7). But of course the Administrator will be more familiar than the state court with the veterans' matters, and the administration of veterans' benefits should be nationally uniform. See *Johnson v. Robinson*, 415 U.S. 361, 369-373 (1974); see also *Hisquierdo*, 439 U.S. at 584. And while it may be true that the children of veterans are

intended beneficiaries of the statutory scheme just as veterans are (see *Rose* Br. 809; *State* Br. 23-25), there can be no serious question of who the principal beneficiary of the scheme is and who was foremost in Congress's concern when it was created. In short, appellees have failed to demonstrate why they should be allowed to reweigh the needs of veterans after Congress has determined those needs and placed authority for administering its statutory scheme in the VA.

2. Appellee *Rose* concedes that in this case the courts below have mandated that child support payments will "be made primarily from veteran's disability benefits" (*Rose* Br. i; See also *Id.* at ii, 4, 7, 8); the State does not challenge this point either (see *State* Br. 6, 23; *State* Mot. to Dis. or Aff. i, 2, 3, 6). There could not, of course, be any serious dispute on this matter, since appellant has conceded that he does not contest the

award except insofar as it requires payment from his veteran's benefits (see, e.g., J.S. 16), and since appellant's limited resources and the amount of the award (see, e.g., Id. at 2) make it inevitable that it is disability benefits which are principally at stake. Similarly, we have not contested the State's right to take into account appellant's total income, including veteran's benefits, in setting the level of child support payments;³ the Solicitor General has explicitly noted, and we agree, that "(t)he statutory restriction extends only to the apportionment of the VA benefits themselves. It does not affect the state court's power to consider the veteran's total income, including his VA benefits,

³In context, we thought it clear--and make it clear now--that when we said the issue here is whether the trial court can "consider" appellant's veteran's benefits, this meant consider for the purpose of requiring their redistribution (see J.S. 16).

in determining the amount of child support to be paid from any other income he may have" (U.S. Br. 12 n. 13). Thus, the only issue in this case is whether, once the level of child support payments is set, appellant can be required to pay them from his veteran's benefits.⁴

3. State appellee (Br. 8-13) contends that its position must prevail because of the importance of child support to the nation, an importance that has been

⁴This was, of course, the issue decided by the Tennessee Court of Appeals (J.S. App. 1a-5a) and the Circuit Court (Id. at 6a-19a).

Accordingly, the unexplained assertion by amici State of Connecticut, et al, (Br. 4) that the issue is not about forced payment but rather about the right of states to consider benefits in framing child support orders is precisely backwards. See also amici State of California, et al, (Br. 4); cf. State Br. 7, 28-29. And the recitation by Connecticut (at 8 & n. 4) and California (at 4-6) of VA communications saying that benefits may be considered but not taken is thus entirely consistent with the position of appellant and the Solicitor General of the United States.

recognized by Congress itself in its enactment of the Child Support Enforcement Amendments of 1984, P. L. No. 98-378, 98 Stat. 1305 (1984), which further recognized the primacy of the states in this area. Of course we do not challenge the general proposition that children of divorced parents should be provided for, and that Congress has endorsed this proposition and the states' leading role--as, we are sure, our opponents do not challenge the general proposition that disabled veterans are entitled to the benefits Congress has provided for them, and that the Veterans' Administration has been entrusted with administering Congress's program. But we think it clear, for the reasons discussed at pages 2-5, supra, that in the situation presented by this case Congress intended to reconcile these two general propositions by affording the VA the authority to apportion the veteran's benefits to his children as appropriate.

It is, of course, a gross exaggeration to say that this reconciliation, which will come into play in only a minuscule proportion of child support cases, will in any way threaten either state authority over these matters generally or any Congressional program specifically. But see State Br. 8-12. Congress has offered Ms. Rose a means for correcting any inequity that may exist, but she has chosen not to utilize it.

For the foregoing reasons and those stated in our opening brief, the judgment of the Tennessee Court of Appeals should be reversed.

Respectfully submitted,
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By: 
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his lawyer

FEBRUARY 1987

AMICUS CURIAE

BRIEF

6
No. 85-1206

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In the Supreme Court of the United States

OCTOBER TERM, 1986

CHARLIE WAYNE ROSE, APPELLANT

v.

**BARBARA ANN MCNEIL ROSE AND
STATE OF TENNESSEE**

**ON APPEAL FROM THE COURT OF APPEALS
OF TENNESSEE, EASTERN DIVISION**

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QUESTION PRESENTED

Whether the Supremacy Clause (U.S. Const. Art. VI, Cl. 2) deprives a state court of jurisdiction to order child support payments to be paid out of federal veterans' disability benefits.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1206

CHARLIE WAYNE ROSE, APPELLANT

v.

BARBARA ANN McNEIL ROSE AND
STATE OF TENNESSEE

*ON APPEAL FROM THE COURT OF APPEALS
OF TENNESSEE, EASTERN DIVISION*

**BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE SUPPORTING APPELLANT**

INTEREST OF THE UNITED STATES

The issue in this case is whether state courts may allocate portions of a veteran's federal disability benefits for the support of his children. The power asserted by the state courts would interfere with the authority of the Administrator of Veterans Affairs to apportion disability benefits. The United States has a substantial interest in maintaining federal control over the veterans' disability benefit program, which serves not only to provide for the veteran disabled in federal military service, but also to support current military personnel needs.

The Court invited the Solicitor General to express the views of the United States at the jurisdictional stage of this case.

STATEMENT

Appellant is a totally disabled Vietnam veteran whose only income derives from disability benefits he receives from the Veterans Administration and the Social Security Administration. His Social Security disability benefits amount to \$281 a month (J.S. App. 8a). He also receives, on his own behalf, \$3,323 a month in veteran's disability benefits.¹ These benefits are based on the fact that appellant is a triple amputee who is blind in one eye (J.S. App. 2a) and therefore, because of these wartime injuries, meets the statutory standard of being so nearly helpless as to be in need of regular aid and attendance (38 U.S.C. 502(b)).² In addition, he receives \$99 a month from the Veterans Administration on behalf of his two minor children, pursuant to 38 U.S.C.A. 315(1) (C) (West Supp. 1986). They receive \$94 a month from the Social Security Administration (J.S. App. 7a). See 42 U.S.C. 402(d).

Appellant and appellee Barbara Ann McNeil Rose were divorced in October 1983; the divorce decree ordered appellant to pay \$800 a month in child sup-

¹ The figures given represent current benefits under 38 U.S.C.A. 314 (West Supp. 1986); the figures in J.S. App. 8a are those received under the superseded statute.

² Pursuant to 38 U.S.C.A. 314(o), (p) and (r) (West Supp. 1986), a veteran who is totally disabled is entitled to a monthly disability benefit not to exceed \$2,325, plus a monthly attendance allowance of up to \$1,487 if he is so nearly helpless as to require the regular attendance of another person (38 U.S.C. 502). See 38 C.F.R. 3.352, defining criteria for determining permanent need for regular aid and attendance.

port (J.S. App. 7a, 1a-2a, 17a). In 1984, appellant refused to continue the payments (J.S. App. 7a), and the district court held him in contempt (J.S. App. 11a).³ Appellant appealed this ruling to the state court of appeals, arguing that neither his Social Security nor his VA disability benefits are subject to state court support orders.⁴ The court of appeals rejected this argument (J.S. App. 1a-5a), and the state supreme court denied permission to appeal (J.S. App. 22a). This Court noted probable jurisdiction on June 30, 1986.

SUMMARY OF ARGUMENT

In 38 U.S.C. 314, Congress has specified in great detail the precise sums to be paid as monthly benefits to veterans disabled in active wartime military service. The payments are based entirely on the degree of disability, and provide an additional supplement to those who, like appellant, are so nearly helpless that they need regular assistance to perform essential personal functions. To assure that the disabled veteran himself receives the benefit of these sums, 38 U.S.C. 3101 broadly exempts these benefits from taxation, from creditors' claims, and from "seizure by or under any legal or equitable process whatever, either before or after receipt" by the veteran. Both the specificity with which the Congress has deter-

³ The court concluded that the children's Social Security benefits were in addition to the \$800 a month support order, but set off the children's VA benefits (then \$90) against the \$800 (J.S. App. 7a). The appellate court agreed (J.S. App. 4a).

⁴ In this Court, appellant does not contest the award insofar as it requires him to use his Social Security benefits to pay child support (J.S. 16). He also has apparently been turning the children's VA benefits over to them (see J.S. App. 7a), and does not contest his obligation to do so.

mined the amounts necessary for the disabled veteran's support and the anti-attachment provision are inconsistent with the state's assertion of authority to reweigh the respective needs of the veteran and his children for these federally-provided funds. In addition, such an assertion of authority is inconsistent with 38 U.S.C. 211(a), which provides that the decisions of the Administrator on matters relating to veterans' benefits are not subject to judicial review. Although that Section in terms bars only review in federal courts, state court actions preempting the Administrator's benefit determinations are inconsistent with the statutory purpose of achieving uniformity of administration reflected in that Section.

The federal statute does recognize that a disabled veteran's children who are not in his custody may have a legitimate claim to some part of his benefits, but it vests the evaluation of such claims in the Administrator of Veterans Affairs. Not having availed herself of the statutorily-prescribed procedures, appellee Barbara Rose is in no position to assert, either in the state courts or in this Court, that the subsistence needs of her children are not adequately satisfied by the federal benefits that they are currently receiving. Such contentions should be made to the Administrator in a claim for apportionment of appellant's disability benefits.

This Court's decisions support our position. In *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), the anti-attachment provision in the Railroad Retirement Act of 1974, 45 U.S.C. 231m, which closely parallels 38 U.S.C. 3101, was held to preempt a state court award of an interest in federal retirement benefits (community property under state law) as part of a property settlement in a divorce proceeding. The Court's analysis, which recognized that the state court

award reduced the amounts Congress provided to the former employee in order to achieve the statutory purposes, applies with at least equal force here. Indeed, in *McCarty v. McCarty*, 453 U.S. 210 (1981), the Court followed *Hisquierdo* in holding military retirement pay immune from division as community property in a divorce settlement. The same result is required *a fortiori* here, where the federal payments reflect the special needs of the seriously disabled veteran. The garnishment provision enacted in the Social Security Act amendments of 1975 and 1977 (42 U.S.C. 659, 662(f)), relied upon by the Court in *Hisquierdo* and *McCarty*, similarly supports the result we urge here. That provision specifically excepts from its scope not only the community property settlements at issue in those cases, but also the veteran's disability benefits at issue here. Thus, in deciding that federal payments that constitute remuneration for employment should generally be subject to garnishment for child support, Congress focussed on veterans' disability payments and again confirmed that (except as otherwise provided in the federal program) they should be reserved for the use of the veteran.

ARGUMENT

A. THE FEDERAL STATUTORY SCHEME PRECLUDES STATE JURISDICTION OVER VETERANS' DISABILITY BENEFITS

There is a clear national obligation to provide for those disabled in military service to their country. In addition, the provision of military disability benefits furthers current military personnel needs and general social goals.⁵ Congress has therefore, since

⁵ Disability payments help maintain a fit military force by encouraging those eligible for benefits to retire, rather than

the Revolutionary War period, provided for disability pensions for veterans injured in active military service in wartime (*McCarty v. McCarty*, 453 U.S. 210, 212-213 (1981)). See generally Subcomm. on Investigations of the House Comm. on Post Office and Civil Service, 95th Cong., 2d Sess., *Dual Compensation Paid to Retired Uniformed Services' Personnel in Federal Civilian Positions* 18-20 (Comm. Print 1978).

1. The current disability benefit provisions, contained in 38 U.S.C.A. 314 (West Supp. 1986), are based entirely on the degree of disability, without regard to military rank or length of service. Indeed, 38 U.S.C. 314 is remarkable for the specificity with which it details the precise amount to be paid for each degree of disability, with particular attention to certain types of injuries (see 38 U.S.C.A. 314(k)-(p)) (West Supp. 1986). In addition, recognizing that some veterans, like appellant, will be so nearly helpless that they require constant assistance in performing essential personal functions, the statute provides for the payment of a monthly aid and attendance allowance of \$998, or—where the veteran needs a “higher level of care”—of \$1,487 (38 U.S.C.A. 314(r)) (West Supp. 1986). The very specificity with which Congress has defined the sums to be provided for the support of the disabled veteran strongly suggests that it did not intend to permit those sums to be reduced by the states. See pages 14-16, *infra*.

Nor is that conclusion left only to implication. Congress took explicit care to assure that the sums

to conceal their disability and continue in active service for economic reasons. They also, like other fringe benefits, facilitate recruitment, helping to attract competent personnel. Furthermore, adequate disability benefits avoid the possibility that the support of disabled veterans will be a burden on local communities.

it has so carefully specified are preserved for the support of the disabled veteran himself. Thus, 38 U.S.C. 3101 restricts the extent to which the benefits may be assigned, exempts them from taxation and from the claims of creditors, and broadly provides that such benefits “shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.”⁶

That provision is controlling here. Its comprehensive language refutes appellee Tennessee’s contention (Mot. to Dis. or Aff. 5) that it should not be applied to child support claims because “the obligation to support dependents is not a debt in the usual sense.” The federal statutory exemption on its face encompasses far more than conventional debts. Moreover, the exemption “should be liberally construed * * * to protect funds granted by the Congress for the maintenance and support of the beneficiaries thereof” (*Porter v. Aetna Casualty & Surety Co.*, 370 U.S. 159, 162 (1962)).⁷

⁶ Congress has included a provision protecting military benefits against attachment or garnishment since 1873, when it stated that a military pension “shall inure wholly to the benefit of [the] pensioner.” Act of Mar. 3, 1873, ch. 234, § 33, 17 Stat. 575-576. In subsequent reenactments, Congress has continued to make clear and reaffirm that its purpose is to exempt veterans’ benefits from creditor actions as well as from taxation. See *Trotter v. Tennessee*, 290 U.S. 354 (1933); *Porter v. Aetna Casualty & Surety Co.*, 370 U.S. 159, 162 (1962).

⁷ This Court held in *Porter v. Aetna Casualty & Surety Co.*, *supra*, that veterans’ benefit funds retain their exempt status after being deposited in the veteran’s savings and loan account. The federal government retained sufficient interest in the funds, even after they passed into the veteran’s possession,

2. Veterans' disability benefits are funded by annual appropriations. In contrast to the employee covered by the Social Security system, the service member makes no contribution to the veterans' benefit retirement system during the period of his active service.⁸ Congress is under no legal compulsion to appropriate these funds; the courts have repeatedly recognized that veterans' pension benefits are "gratuities and establish no vested rights in the recipients so that they may be withdrawn by Congress at any time and under such conditions as Congress may impose." *Milliken v. Gleason*, 332 F.2d 122, 123 (1st Cir. 1964), cert. denied, 379 U.S. 1002 (1965); *deRodulfa v. United States*, 461 F.2d 1240, 1257-1258 (D.C. Cir.), cert. denied, 409 U.S. 949 (1972) (collecting cases).

One such condition is contained in 38 U.S.C. 211 (a), which makes the decision of the Administrator

to protect them from creditors. See also *United States v. Oregon*, 366 U.S. 643, 648-649 (1961), upholding the constitutionality of federal statute asserting federal right to property of intestate veterans who die without heirs in government facilities, against claim by state under its escheat laws. The Court in *Oregon* relied on the congressional power to raise armies and the consequent power "to pay pensions and to build hospitals and homes for veterans" (*id.* at 648). The same powers that extend to requiring the property of the veteran "wards" of the federal government (*id.* at 649) to pass to the federal, rather than the state, government also justify protecting that property in the veteran's hands against the claims of creditors, including the state.

⁸ Military personnel, however, have been required since 1957 to contribute to the Social Security system (Servicemen's and Veterans' Survivor Benefits Act, ch. 837, § 402, 70 Stat. 870). See 42 U.S.C. 410(l) and (m). A service member who, like appellant, meets that Act's eligibility requirements is entitled to Social Security disability benefits.

final on "any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors."⁹ In *Johnson v. Robison*, 415 U.S. 361, 366-374 (1974), the Court refused to interpret the ban on judicial review as extending to constitutional claims, but it nowhere suggested any doubt about the propriety of such a ban on judicial review of "those decisions of law or fact that arise in the administration by the Veterans' Administration of a statute providing benefits for veterans" (415 U.S. at 367 (emphasis in original)).

Section 211(a) explicitly bars only any "other official or any court of the United States" from reviewing the Administrator's benefit decisions. In light of the desire for uniformity of administration upon which the provision is substantially based (*Johnson v. Robinson*, 415 U.S. at 369-373, summarizing relevant legislative history), it is clear, however, that Congress could not have intended to permit review of the Administrator's decision in state courts. Even more inconsistent with this underlying congressional desire for uniformity of administration is the decision of the court below. That decision permits a state court to allocate a veteran's disability benefits in conformance with state policies, wholly without regard to any determination by the Administrator.

⁹ Section 211(a) provides in pertinent part:

the decisions of the Administrator on any question of law or fact under any law administered by the Veteran's Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

3. Such state interference in the federal regulatory scheme is not justified by any gap in the federal system. Congress has recognized that apportionment of a veteran's benefits may sometimes be appropriate to provide for his children when they are not in his custody. Rather than leaving such apportionment decisions to the varied policies and procedures of the state courts, however, Congress preferred to rely on the expert case-by-case judgment of the Administrator of Veterans Affairs. Accordingly, in 38 U.S.C. (& Supp. II) 3107, Congress specifically provided for the apportionment of benefits by the Administrator:

(a) All or any part of the compensation, pension, or emergency officers' retirement pay payable on account of any veteran may—

* * * * *

(2) if the veteran is not living with the veteran's spouse, or if the veteran's children are not in the custody of the veteran, be apportioned as may be prescribed by the Administrator.

Implementing regulations promulgated by the Veterans Administration permit apportionment of all or any part of disability benefits if a claim is filed seeking such apportionment when "the veteran is not residing with his or her spouse, or [when] the veteran's children are not residing with the veteran and the veteran is not reasonably discharging his or her responsibility for the spouse's or children's support." 38 C.F.R. 3.450(a)(1)(i).¹⁰

¹⁰ The *Veterans Administration Manual M-21-1* (ch. 26, ¶ 26.01) (Aug. 1, 1979) further regulates the apportionment of disability awards. It provides in pertinent part:

The statute and regulations thus clearly indicate that the decision concerning the appropriateness of any apportionment of a veteran's disability benefits is one that Congress has placed entirely within the discretion of the Administrator,¹¹ and that he has established procedures under which he exercises that discretion on a case-by-case basis.¹² We are informed by the Veterans Administration that no claim for apportionment of appellant's disability benefits to provide for the support of his minor children has been received to date, so the Administrator has not had the opportunity to exercise his discretion in this case. Appellee Barbara Rose's preference for the state forum in which to press her child support

Apportionment of a competent veteran's benefits may be made *only upon receipt of a claim* therefor [emphasis in original] * * *:

(1) To an estranged spouse and child or children in the spouse's custody.

(2) To a child or children [not living with] the veteran [and to whom the veteran is not reasonably contributing]; except that a claim for apportionment on their behalf should be invited when consistent with the equities.

¹¹ There is no merit to appellee Tennessee's suggestion (Mot. to Dis. or Aff. 7) that the Administrator's apportionment authority is not exclusive because Section 3107 provides that he "may," not that he "shall," order apportionment. Clearly, the statutory term reflects the fact that the Administrator is under no *obligation* to apportion in all cases that meet the statutory criteria: he is to exercise his discretion. There is no suggestion in the statute that this discretion can be superseded by state court determinations.

¹² The records of the Veterans Administration reflect that the July 1986 disability benefits of 27,263 veterans were apportioned.

claims, however, affords no adequate basis for refusing to require compliance with the procedures established pursuant to the mandate of Congress. Since she has not utilized those procedures, she should not be heard to claim in this Court that the federal benefits currently received by the minor children are insufficient. Such claims must be made to the Administrator in an application for apportionment of appellant's disability benefits.¹³

B. THIS COURT'S DECISIONS ESTABLISH THAT STATE COURTS ARE WITHOUT AUTHORITY TO REDUCE THE AMOUNT OF DISABILITY BENEFITS AVAILABLE TO THE VETERAN

1. It has long been recognized that domestic relations law is generally within state control. As this Court stated in *In re Burrus*, 136 U.S. 586, 593-594 (1890), "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the law of the States and not to the laws of the United States." Even when it is alleged that state law conflicts with a federal statute, this Court has limited its review under the Supremacy Clause to a

¹³ The statutory restriction extends only to the apportionment of the VA benefits themselves. It does not affect the state court's power to consider the veteran's total income, including his VA benefits, in determining the amount of child support to be paid from any other income he may have. Thus, in this case, the state court could appropriately have ordered appellant to pay any sum up to \$281 a month—the total amount of his Social Security disability payments—for child support, in addition to the amounts the children receive directly from the VA and Social Security. See n.18, *infra*. It would then also be appropriate for the Administrator to consider that state court order in deciding how much, if any, of the appellant's VA disability benefits should be apportioned to his children.

determination of whether Congress "positively required by direct enactment" that state law be preempted. *Westmore v. Markoe*, 196 U.S. 68, 77 (1904). As this Court stated in *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979), a "mere conflict in words is not sufficient. State family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand the state law be overridden" (quoting *United States v. Yazell*, 382 U.S. 341, 352 (1966)). Nevertheless, this Court in *Hisquierdo* itself, and on several other occasions, has held that under the Supremacy Clause federal law did indeed override conflicting state domestic relations law.¹⁴ This case cannot be meaningfully distinguished from *Hisquierdo* and its progeny. Accordingly, the same conclusion is appropriate here.

In *Hisquierdo*, the Court concluded that a federal statutory provision barring assignment, garnishment or attachment of railroad retirement benefits preempted a state court award of an interest in those benefits (considered community property under state

¹⁴ In a number of instances prior to *Hisquierdo* this Court had held that under the Supremacy Clause federal law overrode state family law. In *McCune v. Essig*, 199 U.S. 382 (1905), federal homestead law, which allowed a widow to establish title to federal land settled by her husband, overrode a state law that would have allowed the daughter to inherit her father's expectation that the title would issue to him. In three cases, survivorship rules in federal savings bond and military life insurance systems prevailed over state community property law. *Yiatchos v. Yiatchos*, 376 U.S. 306, 309 (1964); *Free v. Bland*, 369 U.S. 663 (1962); *Wissner v. Wissner*, 338 U.S. 655 (1950). And see *United States v. Oregon*, 366 U.S. 643 (1961) (federal statute providing for devolution of veteran's property overrides state intestacy law).

law) as part of a property settlement in a divorce proceeding. In analyzing the anti-attachment provision of the Railroad Retirement Act of 1974, 45 U.S.C. 231m, the Court noted (439 U.S. at 584) that it "pre-empts all state law that stands in its way."¹⁵ The Court observed that Congress had provided the precise amount it considered appropriate for an employee's retirement, and that this amount was designed to encourage an eligible employee to retire. As the Court explained, reducing the former employee's retirement pay by assigning part of it to a divorced spouse in a property settlement would reduce the incentive to retire and to that extent would frustrate the congressional purpose in enacting the retirement program (439 U.S. at 585).

Similarly, in the instant case, Congress has provided compensation designed to meet both the requirements of disabled veterans and the personnel needs of the military. In 38 U.S.C. 314, Congress established the precise amount of disability benefits to be paid to a veteran as seriously injured as appellant; it further protected the veteran from the dissipation of those funds by providing that those benefits should be entirely exempt from the claims of creditors and from "attachment, levy or seizure by or under any legal or equitable process whatever" (38 U.S.C. 3101(a)). If the state court order were allowed to redirect a portion of this benefit to the veteran's dependents, the disabled veteran, like the former railroad employee in *Hisquierdo*, would receive less than Congress had deemed necessary to achieve the dual statutory pur-

¹⁵ That provision does not differ in any significant way from 38 U.S.C. 3101(a). Indeed, Section 3101(a) is, if anything, more sweeping.

poses.¹⁶ Moreover, as in *Hisquierdo*, the exercise of such state authority is also inconsistent with the applicable federal anti-attachment provision, which "prevents the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of congressional policy" (439 U.S. at 584).

In *McCarty v. McCarty*, 453 U.S. 210 (1981), the Court considered the relationship of a federal statutory bar on attachment and a state court order treating military retirement pay as community property in a divorce settlement. Applying the *Hisquierdo* analysis (see 439 U.S. at 583), the Court first determined that there was a conflict between the federal retirement provisions and the community property right asserted; it then analyzed that conflict to decide whether the application of community property principles would threaten serious harm to "clear and substantial" federal interests (453 U.S. at 232). The Court found that the community property right asserted would "diminish that portion of the benefit Congress has said should go to the retired [service member] alone" (453 U.S. at 233 (quoting *Hisquierdo*, 439 U.S. at 590)). In addition, military personnel management would be disrupted because allowing community property rights to take precedence would diminish the value of retired pay as an inducement for enlistment or reenlistment and would lessen

¹⁶ Because policies that maximize the fitness of the nation's active duty military personnel have a higher national priority than those that have the same effect on railroad employees, the considerations requiring federal preemption are even stronger in this case than in *Hisquierdo*. See *McCarty v. McCarty*, 453 U.S. 210, 236 (1981). Cf. *United States v. Oregon*, 366 U.S. at 649.

the incentive to retire. This would hinder the congressional objective of maintaining a competent, youthful military (453 U.S. at 234-235).

Similarly, in the instant case, federal law must take precedence in order to insure that disabled service members will receive adequate income and therefore are encouraged to retire rather than conceal disability, and to maintain the incentive for military service provided by disability programs. Here, as in *McCarty*, “[s]tate courts are not free to reduce the amounts that Congress has determined are necessary for the retired member” (453 U.S. at 233).¹⁷

2. In both *Hisquierdo* (439 U.S. at 586-587) and *McCarty* (453 U.S. at 230-232), the Court relied in its analysis on the 1975 and 1977 amendments to the Social Security Act. In these amendments, Congress provided that, notwithstanding any contrary law, federal benefits may be reached by garnishment to satisfy a child support or alimony obligation (42 U.S.C. 659). Congress, however, specifically excepted from the definition of alimony “transfer[s] of property * * * in compliance with any community property settlement” (42 U.S.C. 662(c)). Thus, Congress had demonstrated its intent that community property claims should not be allowed to “deflect[] other fed-

¹⁷ Accepting the Court’s invitation in *McCarty*, 453 U.S. at 235-236, Congress considered the “plight of an ex-spouse of a retired service member” and enacted, in the Uniformed Services Former Spouses’ Protection Act, Pub. L. No. 97-252, Tit. X, 96 Stat. 730 *et seq.*, a new section, 10 U.S.C. 1408, to permit state courts to allocate military retired pay in divorce proceedings. See H.R. Conf. Rep. 97-749, 97th Cong., 2d Sess. 165 (1982). Significantly, however, the statute specifically excludes from its provisions the “retired pay of a member retired for disability” (10 U.S.C. 1408(a)(4)).

eral benefit programs from their intended goals” (*Hisquierdo*, 439 U.S. 587; see *McCarty*, 453 U.S. at 230). Accordingly, the Court held that a state court order reflecting a community property settlement in a divorce proceeding could not be allowed to override this express congressional enactment.

The garnishment statute similarly demonstrates congressional intent regarding veterans’ disability benefits. It provides that federal benefits may be garnished for child support if they are “moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States” (42 U.S.C. 659(a)). As we explained, pages 6, 8, *supra*, veterans’ disability benefits are not remuneration for employment. Moreover, a definitional provision specifically excludes “any payments by the Veterans’ Administration as compensation for a service-connected disability or death.”¹⁸ 42 U.S.C. 662(f)(2).¹⁹

As in *Hisquierdo* and *McCarty*, therefore, Congress has made clear its intent. While Congress believed that the need to provide financial support for a family could justify garnishment of some federal benefits, it specifically determined that the veterans’ disability

¹⁸ In contrast, Social Security disability payments—“payments * * * under the insurance system established by subchapter II of this chapter”—are subject to garnishment by virtue of the 42 U.S.C. 662(f)(2) definition.

¹⁹ VA disability payments may, however, be garnished if paid to “a former member of the Armed Forces who is in receipt of retired or retainer pay if such former member has waived a portion of his retired pay in order to receive such compensation” (42 U.S.C. 662(f)(2)). Appellees do not claim that appellant is such a person.

benefit program is *not* to be subject to garnishment.²⁰ It has, indeed, specifically insulated disability payments under the program from "attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary" (38 U.S.C. 3101(a)); and it has vested exclusive authority to apportion such benefits in the Administrator of Veterans Affairs (see pages 10-12, *supra*). Just as in *Hisquierdo* and *McCarty*, therefore, a state court order in a divorce proceeding may not take precedence over what Congress has ordained.

²⁰ The power of Congress to bar the garnishment of veterans' benefits is based on sovereign immunity. See *Buchanan v. Alexander*, 45 U.S. (4 How.) 20 (1846); *Smith v. Jackson*, 246 U.S. 388 (1918). In passing the Social Security amendments, Congress intended partially to waive sovereign immunity in order to permit garnishment of the pay of federal employees who might otherwise fail to make alimony or child support payments. See S. Rep. 93-1356, 93d Cong., 2d Sess. 53-54 (1974). See also *Diaz v. Diaz*, 568 F.2d 1061 (4th Cir. 1977); *Young v. Young*, 547 F. Supp. 1 (W.D. Tenn. 1980); *Meadows v. Meadows*, 619 P.2d 598 (Okla. 1980). While Congress made the United States subject to certain garnishment proceedings, principles of sovereign immunity require that the statutory provisions be strictly construed. In any event, as we have shown, veterans' disability benefits are explicitly excluded from the waiver of immunity.

Of course, this case, like *Hisquierdo* and *McCarty*, involves no direct attempt to garnish federal benefits, nor any other state court order requiring the federal agency to make payment directly to the federal beneficiary's dependents. That circumstance did not deter the Court from analyzing the practical effects of the state court orders in *Hisquierdo* and *McCarty*; the same analysis is appropriate here. See also *United States v. Oregon*, 366 U.S. at 648-649.

CONCLUSION

The decision of the Tennessee Court of Appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE

BRIEF

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IN THE
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OCTOBER TERM, 1986

CHARLIE WAYNE ROSE,
v. *Appellant,*

BARBARA ANN McNEIL ROSE

AND

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BRIEF OF AMICI CURIAE
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ASSOCIATION FOR CHILDREN FOR
ENFORCEMENT OF SUPPORT;
CHILDREN'S DEFENSE FUND;
EQUAL RIGHTS ADVOCATES, INC.;
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**KIDS IN NEED DESERVE EQUAL RIGHTS;
LAWYERS' ASSOCIATION FOR WOMEN;
NEED FOR SUPPORT ENFORCEMENT;
NOW LEGAL DEFENSE AND EDUCATION FUND;
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v.

BARBARA ANN McNEIL ROSE

AND

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Appellees.

On Appeal from the Court of Appeals of Tennessee
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**BRIEF OF AMICI CURIAE
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ENFORCEMENT OF SUPPORT;
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THE CHILD SUPPORT TASK FORCE;
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KIDS IN NEED DESERVE EQUAL RIGHTS;
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NOW LEGAL DEFENSE AND EDUCATION FUND;
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INTERESTS OF AMICI CURIAE

As described in detail in the attached appendix, amici curiae are organizations involved in issues affecting parents and children.¹ These organizations are concerned with child support enforcement because they wish to pro-

¹ The interests of amici curiae are set forth in detail in the attached appendix to this brief. Pursuant to Rule 36.2 of the Rules of this Court, amici file this brief pursuant to letters of consent lodged with the Clerk of the Court.

mote the interests of children, who suffer the consequences of economic deprivation when they do not receive adequate support. At the same time, they wish to ensure that child support obligations are distributed equitably between parents, and recognize that all too often, a disproportionate burden of child support falls upon custodial parents—who are overwhelmingly women. Indeed, this is one of the major causes of the alarming increase in the incidence of poverty in female-headed households.²

As a result of their involvement in litigation and legislative proceedings on the state and federal level concerning child support awards and enforcement, as well as community organization and education, amici are familiar with and deeply concerned about the issues before the Court. Through this long history of involvement, amici are also uniquely qualified to inform the Court of the dimensions of the child support problem.

INTRODUCTION

Child support in the United States is a scandal, and children are the innocent victims of a system that too often does not work. Most studies lead to the same conclusions—child support awards are inadequate to cover the costs of raising children, and more often than not non-custodial parents—usually fathers—fail to pay even a small percentage of the amounts they have been ordered to pay to support their own children.³ Appellant Charlie Wayne Rose is asking this Court to reverse decades of

² In 1983, women made up 61% of all individuals 16 or over who had incomes below the poverty line. Forty-seven percent of all poor families are headed by women. U.S. Department of Labor, Women's Bureau, *20 Facts on Women Workers* (1984).

³ Fathers comprise 95 percent of the parents who are ordered to pay child support. L. Weitzman, *The Divorce Revolution* 269 (1985).

jurisprudence supporting state authority to determine and enforce adequate child support.

Charlie Rose is obviously a valiant, decorated veteran. But, like the majority of non-custodial parents, he has failed to support adequately his children. Following his disability, he married Barbara Ann McNeil Rose in 1973. They had two children, Charlie Jr., now age 12, and Caleb, now age 9. In 1983, the Roses were divorced. Mr. Rose's monthly income from Social Security and veterans benefits totals \$3,604, *tax free*. The state trial judge considered the needs of Mr. Rose, the needs of the children, and Mr. Rose's substantial income and ordered him to-pay \$800 each month to support his children.

Mr. Rose apparently did not appeal or otherwise dispute the amount of the award and, indeed, complied with the award for several months. And then he, like many other non-custodial parents, stopped paying. While he continued to receive \$3,604 each month tax free, his children were receiving only \$90 each month in veterans' dependents benefits. He now argues that various federal statutes divest the trial court of jurisdiction to order child support payments out of his veterans benefits. Amici submit that Congress could not have intended to create a system that enables a non-custodial parent to leave his children in such a precarious position.

SUMMARY OF ARGUMENT

The Court should affirm the decisions of the Tennessee state courts. There is a major child support crisis in this country. The majority of children eligible for child support receive none. The average amount of child support awarded covers less than one-half of the cost of raising children. Most non-custodial parents fail to pay even the inadequate amounts that are awarded. Congress' commitment to solving this problem confirms that Congress

surely did not contemplate insulating the income of an entire class of non-custodial parents—veterans—from the needs of their children.

Over a century ago, this Court recognized that family law issues should be resolved in the state courts. That system should not be disrupted merely because a portion of the funds available to pay child support came from the Veterans Administration, a federal agency not equipped to handle child support issues, which are inherently local in nature. Those issues, like divorce, custody, and other related matters, should be resolved in a single forum—the state courts.

Finally, a non-custodial parent's obligation to support his children is not an ordinary debt owed to an ordinary creditor and should not be treated as such under the veterans benefit laws. It is, rather, both a moral and legal obligation. Contrary to Appellant's argument, enforcement of that obligation is completely consistent with federal law. The veterans benefits legislation was designed, in part, to protect veterans' dependents—their children.

ARGUMENT

I. THE CHILD SUPPORT CRISIS.

A. Child Support Is Usually Inadequate and Unpaid.

The level of support of children by non-custodial parents has been called a "national disgrace."⁴ The child support crisis has many causes—inadequate support awards, irregular or nonexistent payments, and ineffective enforcement. But whatever the cause, it has become

⁴ Office of Child Support Enforcement, U.S. Department of Health and Human Services, *Child Support: An Agenda for Action* (1984) (Statement by Margaret Heckler, then Secretary of Health and Human Services).

apparent that most non-custodial parents will not pay child support unless and until they are forced to do so.⁵

This failure to pay imposes the entire burden of support on the custodial parent, and the children—Charlie Jr., Caleb, and others—suffer real hardship. There are almost 12.6 million children in this country eligible for child support; the majority receive none.⁶ When support is awarded, it is usually far less than the actual costs of raising a child.⁷ In 1983, the mean amount of support received by a custodial parent was \$2341 per year.⁸ However, the most conservative estimate of the costs of raising two children to age 18 is \$139,000 or \$7,722 per year—far in excess of that amount.⁹ Moreover, this conservative figure does not include the child care expenses for a single, employed mother, a necessity if the custodial

⁵ Although child support laws are facially neutral, in practice their effects are tied directly to gender. Over 90% of all children who live with one parent, live with their mother. Therefore, it is most often she who bears the brunt of the child rearing costs. Bureau of the Census, U.S. Department of Commerce, *Marital Status and Living Arrangements: March 1981*, in Current Population Reports, Series P-20, No. 372, at 1 (1982) ("*Marital Status*"). See generally Roberts, *Ameliorating the Feminization of Poverty: Whose Responsibility?*, 18 Clearinghouse Rev. 883 (Dec. 1984).

⁶ *Marital Status* at 1, 5 (table D).

⁷ A study in California showed that the average award did not cover even half of the costs of actually raising children. See Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. Rev. 1181, 1240 (1981).

⁸ Bureau of the Census, U.S. Department of Commerce, *Child Support and Alimony: 1983*, in Current Population Reports, Series P-23, No. 141, at 2 (1983) ("*Child Support: 1983*").

⁹ T. Espenshade, *Investing in Children* 26-28 (1984). This calculation includes out-of-pocket expenses for such things as birth, food, clothing, housing, transportation, medical care, and education. The figures cited are derived for the lowest socioeconomic level.

parent must work to be economically self-sufficient.¹⁰ Since the amount of the average child support award is not enough to cover the expenses the custodial parent must bear, she most often bears an inequitable share of the economic burden.

If custodial parents and children tried to live on child support alone, almost all of them (93%) would be living in poverty—i.e., below the Department of Labor's Lower Standard Budget.¹¹ Thus, the children must live on what the custodial parent is able to earn or on public assistance. Sometimes, a custodial mother must enter the workforce for the first time since her children were born, where she is at a distinct disadvantage relative to the father due to her lower earning capacity. Public assistance provides far less than she needs.¹²

The inadequacy of child support awards is exacerbated by the fact that most child support awards go substantially unpaid. The amount of child support actually paid is almost invariably much less than the amount ordered by the court. In 1981, fewer than one-half of the 4 million custodial parents owed child support payments re-

¹⁰ Minimal child care costs for a preschool child can easily exceed \$3,000 per year. A 1980 California study placed the monthly cost of full-time day care between \$195 and \$205 per child. After-school care for older children of full-time working mothers poses an additional cost. *The Divorce Revolution* at 271-72.

¹¹ Weitzman, *supra* note 6, at 1239.

¹² The dominant public assistance program, Aid to Families with Dependent Children (AFDC), supplies parents with "subsistence" level support. The amount is based on the number of children as determined by a state schedule conforming to federal law. 42 U.S.C. § 602(a) (1982). The inadequacy of these awards to meet a family's total expenses is well-known. As one commentator stated, AFDC "grants provide for a subsistence far below that which any of us would consider even a minimal standard of living." Law, *Women, Work, Welfare, and The Preservation of Hierarchy*, 131 U. Pa. L. Rev. 1249, 1325 (1983). The levels of grants in Tennessee historically are below the national average. *Id.* at 1324.

ceived the full amount they were due, approximately 25 percent received less than they were awarded, and 28 percent received nothing at all.¹³ The majority of custodial mothers receive less than \$1500 per year in child support, and for 50 percent of those entitled to support, such payments constitute less than 10 percent of the total family income.¹⁴ Non-custodial fathers fail to pay over \$4 billion in child support each year.¹⁵

The relative financial well-being of the custodial and non-custodial parents often changes dramatically after divorce. Although the standard of living for women and children in one study decreased by 73 percent of the time following divorce, the post-divorce standard of living for men increased 42 percent.¹⁶ The father has a higher standard of living because child support payments average only 13 percent of male income.¹⁷ A Denver study showed that *two-thirds of fathers spent more on their monthly car payments than on child support.*¹⁸ A Michi-

¹³ Bureau of the Census, U.S. Department of Commerce, *Child Support and Alimony: 1981*, in Current Population Reports, Series P-23, No. 124 (1982) ("*Child Support: 1981*"); see also Bureau of the Census, U.S. Department of Commerce, *Child Support and Alimony: 1978*, in Current Population Reports, Series P-23, No. 106, at 1 (1979).

¹⁴ Bureau of the Census, U.S. Department of Commerce, *Divorce, Child Custody and Child Support*, Special Studies Series P-23, No. 84 (1979).

¹⁵ Note, *Constitutional Implications of the Child Support Enforcement Amendments of 1984*, 24 J. Fam. L. 301 (1985-86).

¹⁶ Weitzman, *supra* note 6, at 1251.

¹⁷ *Child Support: 1981*, at 1.

¹⁸ Yee, *What Really Happens in Child Support Cases: An Empirical Study of Establishment and Enforcement of Child Support Orders in the Denver District Court*, 57 Den. L.J. 21, 36 (1979). "The average car payment was \$136.97 per month. The average support payment of the same fathers was \$113.59 per month. In only 33.3% of the cases was a father ordered to pay more to support his child or children than he paid for his car." *Id.*

gan study revealed that 80 percent of fathers could pay all of their court ordered support and still live at or above the Department of Labor's Intermediate Standard Budget.¹⁹ A California study showed that 61 percent of fathers could pay all of their court ordered support and still live at or above the Department of Labor's Higher Standard Budget.²⁰ Thus, most non-custodial parents' failure to pay is not due to their inability to afford it.

Our judicial system often tolerates the failure to pay child support. Many judges forgive past failure to pay.²¹ Others fail to order attachments of wages or other mechanisms designed to insure that child support is actually paid.²²

Alarming as these statistics are, they do not reflect the emotional consequences of inadequate child support to Charlie Jr., Caleb, and other children. The consequences of underpaid and unpaid child support go far beyond the loss of financial resources and lower living standards. The effects upon the children are far-reaching and often devastating:

The children's school and social lives are disrupted as they move, often more than once, to less-expensive housing. The children are subjected to a doubly difficult situation: that of spending less time with the custodial parent who must increase her hours of employment at precisely the time when the children are adjusting to their father's absence. In addition, the children suffer because their living standard is substantially and visibly lower than their fathers'.

Woods, *Child Support: A National Disgrace*, Youth Law News, Nov.-Dec. 1983, at 5, 8.

¹⁹ D. Chambers, *Making Fathers Pay* 48 (1979).

²⁰ Weitzman, *supra* note 6, at 1238-39.

²¹ *The Divorce Revolution* at 292-95.

²² *Id.*

This tragic situation spurred Congress in 1984 to enact legislation to require adequate awards and strengthen child support enforcement. Witnesses at Congressional hearings not only pointed to non-custodial parents' flagrant violations of the law, but also faulted society for not insisting on enforcement of awards.²³ The ease with which parents were able to avoid their legal and moral responsibilities regarding child support was contrasted with the strict enforcement of ordinary commercial lending laws. As Representative Patricia Schroeder said, this society tolerates parents who are more conscientious about their car payments than their child support.²⁴

B. Federal Policy Has Long Recognized Problems in Child Support as a National Emergency.

Congress has pursued a long and consistent effort to ensure that this nation's children are adequately supported. In 1975, Congress enacted the Child Support Enforcement Act "[f]or the purpose of enforcing the support obligations owed by absent parents to their children . . ." 42 U.S.C. § 651 (1982). The 1975 legislation established a Child Support Office at the Department of Health and Human Services, provided assistance in locating parents who failed to meet their obligations, and provided financial support to state agencies that attempt to enforce child support awards. A 1977

²³ See Child Support Enforcement Legislation: Hearing Before the Subcomm. on Public Assistance and Unemployment Compensation of the House Comm. on Ways and Means, 95th Cong., 1st Sess. 275 (1983) (e.g., statement of Ruth E. Murphy). One mother testified:

My own children, like thousands of others, have been denied their economic birthright by a father who swore he would never pay a dime in child support, and by courts that have failed to enforce their own orders. The truth is that if a father chooses to be uncooperative, there is little a mother can do.

Id. at 105 (statement of Gail Forsythe).

²⁴ *Child Support Law Passed*, Miami Herald, Aug. 9, 1984, at 4A.

addition made federal wages subject to garnishment in enforcement proceedings. 42 U.S.C. §§ 651-665.

However, the 1975 legislation was inadequate to the enormous task at hand. In 1984, a unanimous Congress enacted the Child Support Enforcement Amendments, "to assure, through mandatory income withholding, incentive payments to States, and other improvements in the child support enforcement program, that *all* children in the United States who are in need of assistance in securing financial support from their parents will receive such assistance. . . ." Pub. L. 98-378, 98 Stat. 1305 (codified at 42 U.S.C. § 651 *et seq.*) (emphasis added). Among other things, the 1984 amendments require states to implement procedures to deduct outstanding child support from wages and other income, impose liens against real and personal property of non-custodial parents, and establish standards for support awards. The last point is particularly important, because it is intended to insure that awards are actually adequate to support children.

The 1984 amendments expressly recognize that child support obligations differ from ordinary debts. The law requires states to give support obligations priority over any other legal process under state law against the same wages. 42 U.S.C. § 666(b)(7) (Supp. III 1986). The Report of the House Ways and Means Committee stated: "The Committee believes that *the payment of child support is such a fundamental obligation that it takes precedence over other economic burdens or liabilities that parents may incur.*" H. Rep. No. 527, 98th Cong., 1st Sess. 34 (1983) (emphasis added).

In signing the 1984 amendments into law, President Reagan stated:

The failure of some parents to support their children is a blemish on America. As a decent and caring people, it behooves us to come to grips with the devil-may-care attitude of some of our citizens that has

left too many children in dire straits. Permitting individuals to ignore parental obligations and giving the bill to the taxpayers in the form of higher welfare costs have been tantamount to a stamp of approval. And this is not the kind of message public policy should be sending out.

Remarks on Signing H.R. 4325 into Law, 20 Weekly Comp. Pres. Doc. 1125, 1126 (Aug. 16, 1984).

As Congress has recognized, the responsibility of caring for children does not end with separation or divorce. Parents have both a legal and moral obligation to support their children. While the legal obligation to continue to provide support after divorce was established by the 1920's,²⁵ the moral obligation was described much earlier by Blackstone as "a principle of natural law." 1 W. Blackstone, *Commentaries on the Laws of England* 434-37 (1966 ed.). Federal policy has established this principle as a national priority and has charged states with the mandate for fulfilling the need for adequate child support. Appellant's argument is squarely contrary to this policy and should be rejected.

II. CHILD SUPPORT DECISIONS SHOULD BE MADE IN THE FORUM BEST EQUIPPED TO MAKE THEM—THE STATE COURTS.

Appellant and the Solicitor General now argue that the state court that granted the Roses a divorce and ordered a division of their marital property was the wrong forum to enter an enforceable order providing for the support of their young children, Charlie Jr. and Caleb. Rather, they suggest that Barbara Ann McNeil Rose must forego the wisdom and experience of the nearby state courts and instead submit a "claim"²⁶ to the Veterans Administrator

²⁵ See 1 J. Schouler, *A Treatise on the Law of Marriage, Divorce, Separation and Domestic Relations* § 780, at 856-57 (1921).

²⁶ The procedure for filing such a "claim" is not specified in the regulations promulgated by the Veterans Administrator. See 38 C.F.R. § 3.450 *et seq.* (1986).

for child support which, under the state court's decision, is already owed her. Brief for Appellant at 34-35; Brief for the United States at 8-10. This "claim" for "apportionment" then would be resolved by non-judicial personnel of a federal administrative agency based solely on a record of unspecified dimensions.

This argument ignores the practical implications of such a result. It also overlooks the long jurisprudential history vesting the state courts with exclusive responsibility for such matters. Finally, it fails to take account of Congress' clear intent that the state courts retain their jurisdiction over family law matters.²⁷

A. The Duplicative Proceedings Proposed By Appellant Are Inefficient and Burdensome.

Appellee Barbara Ann McNeil Rose secured a divorce decree and an award of child support from the Circuit Court for Washington County at Jonesboro, Tennessee. The Circuit Court had jurisdiction over the parties, was familiar with the local economic conditions, and had an opportunity to receive any evidence and evaluate any witnesses that either party chose to offer. The Circuit Court's discretion to fix an award of child support was guided by statutory considerations, including the needs and resources of each parent, and the needs of the children.²⁸ After weighing these factors and Charlie Rose's

²⁷ Although the Child Support Enforcement Amendments of 1984 required the states to alter their child support laws and procedures, each state was obligated to enact its own legislation, establish its own child support guidelines, and establish its own expedited process for adjudicating support obligations. After determining that child support issues needed greater study, Congress mandated that *each state* establish its own Child Support Commission. The entire Congressional scheme, in fact, reflects a recognition that child support is primarily a state-by-state matter.

²⁸ Tennessee law directs the state courts, in determining the appropriate award of child support, to consider:

(1) The age, physical, mental and emotional condition of each child;

particular needs, the Circuit Court ordered Appellant to pay \$800 each month in child support. Although Tennessee law permits an appeal as of right from such a decree, *see, e.g., Harwell v. Harwell*, 612 S.W.2d 182 (Tenn. App. 1980), he did not appeal the Circuit Court ruling or otherwise contend that he was left without sufficient resources on which to live. He now claims that the Veterans Administration, not the Circuit Court, should have resolved this matter.

However, the Veterans Administration is a wholly inappropriate body in which to vest exclusive jurisdiction over child support issues. Unlike the Tennessee Circuit Court, the Administrator is completely unfamiliar with Barbara Ann Rose, her children and their living conditions. The Veterans Administrator has no familiarity with the local economic conditions of Washington County, Tennessee, and has no opportunity personally to observe the parties. There is no body of precedent or statutory principles to guide the Veterans Administrator in "apportioning" child support and, according to the Solicitor General's interpretation of 38 U.S.C. § 211(a), there is no possibility for any judicial or administrative review of any child support award the Administrator might make. By contrast, state law, such as that applied by the Tennessee courts in this case, provides guidance to

- (2) The educational needs of each child and the educational advantages each child had available at the time the circumstances requiring a court order for his or her support arose;
- (3) The earning capacity, obligations and needs, and financial resources of each parent;
- (4) The contributions, monetary and nonmonetary, of each party to the well-being of the children;
- (5) The financial resources of each child;
- (6) The standard of living each child has enjoyed during the marriage; and
- (7) Such other factors as are necessary to consider the equities for the parents and children.

Tenn. Code Ann. § 36-5-101(e) (1984 & Supp. 1986).

courts of the factors to consider in awarding child support.²⁹ State law also provides for appellate review. Given the strong Congressional interest in obtaining adequate support for children, it is inconceivable that Congress intended the children of veterans to be subject exclusively to a process with little substantive guidance and no review whatsoever. Moreover, the Veterans Administrator lacks the training, experience, and resources necessary to resolve child support issues in the interests of children.

Appellant and the Solicitor General suggest that the former wives and the children of disabled veterans should be relegated to pursuing two separate proceedings in an effort to secure a sufficient child support award. First, they must secure a divorce, a custody award, and a portion of their child support award in state court. The state court, it is suggested, may "consider" the father's VA benefits "in determining the amount of child support to be paid from any *other income* he may have," but may not enforce the award from such benefits. Brief of the United States at 10 n.13 (emphasis added). Then, a sep-

²⁹ Under the recent Child Support Enforcement Amendments, there soon will be standards for support awards. The Amendments require each state to establish child support guidelines to be made available by October 1, 1987 to all judges and other officials who will be involved in setting children support amounts for separation, divorce and paternity cases. These guidelines must be based on "specific descriptive and numeric criteria and result in computation of the support obligation," 45 C.F.R. § 302.56. This means that the guidelines must consist of a quantitative formula rather than a mere list of discretionary factors. One purpose of these guidelines is to promote uniformity in orders affecting families in similar economic circumstances. The federal law did not require the Veterans Administration to develop a guideline. This implies that Congress did not intend the Veterans Administration to establish child support orders. If appellant prevails, the very goal of uniformity and fairness in support awards will be frustrated. This case is a perfect illustration of this inappropriate disparity, as the Veterans Administration has established \$90 child support in contrast to the \$800 established by the state court as adequate.

arate and independent "claim" must be filed with the Administrator, who may (or may not) "consider" that state court order in apportioning (or not apportioning) the benefits. Finally, they must present much of the same evidence in an administrative proceeding in Washington, D.C. *Id.*³⁰

As applied to the *Rose* case, this incredible duplication of effort converts the state court proceedings into a futile charade in which the court has power only to enforce compliance with less than 40 percent of the child support award it deemed necessary.³¹ The time, expense, and complexity of obtaining and enforcing a child support award is doubled without any countervailing benefits.

B. Congress Did Not Intend to Divest the State Courts of Their Traditional Jurisdiction.

The source of the purported exclusive jurisdiction of the Veterans Administrator is claimed to be 38 U.S.C. § 3107, which provides merely that a veteran's benefits "may . . . be apportioned as may be prescribed by the Administrator." 38 U.S.C. § 3107(a)(2) (emphasis added).³² To read this provision as a *mandatory* ouster of state court jurisdiction over a veteran's disability benefits, rather than as creating a permissive mechanism,

³⁰ Nothing in this dual process ensures that the evaluations by the state court and the Veterans Administration of the parties' relative needs and resources will be consistent. It is conceivable, for example, that the state court would find a family's needs to be greater than it has jurisdiction to satisfy, while the Veterans Administrator may find its needs to be much less. Such a result leaves a custodial parent in dire straits without remedy.

³¹ The Circuit Court found the adequate level of child support to be \$800 per month, but Appellant and the Solicitor General contend that the court could enforce payment from only \$290 of Appellant's monthly income.

³² The common linguistic meaning of the word "may" is, of course, permissive. See *The American Heritage Dictionary* 808 (1976).

would be to override centuries of jurisprudence giving the states control over matrimonial matters. Such a construction would also be contrary to established federal child support enforcement policy.

Historically, the jurisdiction of the English Chancery did not embrace the subjects of divorce, alimony, and related matrimonial matters and, accordingly, all power or cognizance with respect to those subjects by the courts of the United States in chancery is equally excluded." *Barber v. Barber*, 52 U.S. (21 How.) 582, 605 (1858) (emphasis added). State courts, rather than federal courts, inherited the jurisdiction of the ecclesiastical courts over matrimonial and domestic actions. 1 J. Moore & J. Lucas, H. Fink, D. Weckstein & J. Wicker, *Moore's Federal Practice* ¶ 0.6[2-2], at 219 (2d ed. 1986). Thus, as this Court recognized almost a century ago, "[t]he whole subject of the domestic relations of husband and wife, parent and child belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-94 (1890). Federal courts have no jurisdiction over suits to establish child support. *Albanese v. Richter*, 161 F.2d 688 (3d Cir.), cert. denied, 332 U.S. 782 (1947).

Cases involving domestic relations touch upon state law and policy in a deep and sensitive manner. *Overman v. United States*, 563 F.2d 1287 (8th Cir. 1977). The well-being of a state's residents, and the corresponding ability to enforce obligations for the well-being of those residents, is unarguably an interest of paramount importance to a state. See *Fontain v. Ravenel*, 58 U.S. (17 How.) 369 (1854). Because state courts historically have decided these matters, they are proficient and expert in resolving these cases and have a strong interest in disposing of them. *Firestone v. Cleveland Trust Co.*, 654 F.2d 1212, 1215 (6th Cir. 1981); *Solomon v. Solomon*, 516 F.2d 1018, 1025 (3d Cir. 1975).

Federal courts have often noted the aptitude of state courts in resolving child support controversies. As the Ninth Circuit observed:

There are many criteria to be considered in child support cases, such as the standard of living, employment and wages of the father, most of which are intimate to the parties and dependent upon the particular conditions existing in the area where the parties reside. State courts deal with these problems daily and have developed an expertise that should discourage the intervention of federal courts. As a matter of policy and comity, these local problems should be decided in state courts.

Buechold v. Ortiz, 401 F.2d 371, 373 (9th Cir. 1968). *Accord Magaziner v. Montemuro*, 468 F.2d 782, 787 (3d Cir. 1972); *Wiesenfeld v. State of New York*, 474 F. Supp. 1141, 1145-46 (S.D.N.Y. 1979). Similarly, the Fifth Circuit enumerated the reasons for abstention in favor of state courts as "the strong state interest in domestic relations matters, the competence of state courts in settling family disputes, the possibility of incompatible federal and state court decrees in cases of continuing judicial supervision by the state, and the problem of congested dockets in federal courts." *Crouch v. Crouch*, 566 F.2d 486, 487 (5th Cir. 1978). None of these factors are any less compelling because one of the parties is a veteran.³³

The interpretation advanced by Appellant and the Solicitor General also sharply conflicts with the Congress-

³³ Obviously, federal court involvement in family law related matters is appropriate in discrete circumstances related to application of federal statutes. Under no circumstances, however, have basic substantive divorce-related matters, such as whether the grounds for divorce exist, whether it is in the child's best interests to be in the custody of a particular parent, or how much child support should be ordered, been removed from the state courts and placed within the purview of federal courts or agencies. This should not be the first case to do so.

sional intent, as expressed in the Child Support Enforcement Act and its recent amendments to strengthen the ability of states to enforce child support awards. Recognizing that "[s]tate and local governments must focus on the vital issues of child support . . . and other related domestic issues that are properly within the jurisdictions of such governments," S. Rep. No. 387, 98th Cong., 2d Sess. 42, *reprinted in* 1984 U.S. Code Cong. & Ad. News 2397, 2477, the amendments seek to create uniformity in state child support enforcement efforts through the development of national guidelines under which mandatory state child support plans are evaluated. 42 U.S.C. § 654. "The child support statute leaves basic responsibility for child support enforcement . . . to the States." S. Rep. No. 387 at 9, 1984 U.S. Code Cong. & Ad. News at 2405 (emphasis added). Thus, it is the states that are required to develop substantive plans for attaining adequate child support awards. Needless to say, the Veterans Administration is not required to comply with these or any other guidelines.

The benefits of these Congressional efforts to expedite and toughen child support enforcement should not be denied to Charlie Wayne Rose, Jr. and Caleb Rose solely because the funds in their father's bank account came from the Veterans Administration. This fortuity renders Charlie Jr. and Caleb no less in need of the support deemed appropriate by the state court, nor their father any less able to pay.

This case is not, as the Solicitor General suggests, about "state interference in the federal regulatory scheme." Brief for the United States at 8. Rather, it implicates precisely the converse. Congress never intended to provide veterans with a mechanism to avoid their child support obligation. *Veterans Administration v. Kee*, 706 S.W.2d 101, 103 (Tex. 1986) (Gonzalez, J., dissenting). There is, to the contrary, a heavy presumption that Congress did not intend to interfere with the workings of

state domestic relations law. *Stone v. Stone*, 450 F. Supp. 919, 924-25 (N.D. Cal. 1978), *aff'd*, 632 F.2d 740 (9th Cir. 1980), *cert. denied sub nom. Seafarers International Union v. Stone*, 453 U.S. 922 (1981). See also *United States v. Yazell*, 382 U.S. 341, 352 (1966).

III. AWARDS OF CHILD SUPPORT AND ENFORCEMENT OF THOSE AWARDS DO NOT CONTRAVENE THE VETERANS BENEFITS LAWS.

Appellant and the Solicitor General argue that the state courts lack jurisdiction to provide for the payment of child support out of veterans benefits payments because the veterans benefits legislation provides that such payments are "exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process. . . ." 38 U.S.C. § 3101(a). This argument fails because a court-ordered child support award is not a debt owed to a creditor and has not, in this case, been "attached, levied, or seized."

The obligation of a parent to support his children is not a debt and minor children are not mere creditors. This Court has recognized that the parental support obligation differs from an automobile loan. In *Wetmore v. Markoe*, the Court wrote:

[A] decree awarding alimony to . . . children . . . is not a debt that has been put in the form of a judgment, but is rather a legal means of enforcing the obligation of the husband and father to support and maintain his wife and children. He owes this duty, not because of any contractual obligation or as a debt due from him to his wife, but because of the policy of the law which imposes the obligation upon the husband. The law interferes when the husband neglects or refuses to discharge this duty and enforces it against him by means of legal proceedings. 196 U.S. 68, 74 (1904).

Accord Gaskins v. Security-First National Bank, 30 Cal. App. 2d 409, 86 P.2d 681 (1939); *Speckler v. Speckler*,

256 Md. 635, 261 A.2d 466 (1970); *Donovan v. Donovan*, 15 Mass. App. 61, 443 N.E.2d 432 (1982); *Dillard v. Dillard*, 341 S.W.2d 668 (Tex. Civ. App. 1960).

Moreover, Appellant's argument is based on the assumption that veterans benefits were intended for the exclusive benefit of the veteran himself. The legislative history and express language of the veterans benefit legislation squarely contradict that argument. The veterans benefit statutes contain many provisions reflecting Congressional intent to insure that veterans *and their dependents* be provided for adequately. Indeed, the first three sections of Title 38 of the U.S. Code concerning veterans benefits relate to spouses, children, marriages, and dependent parents. 38 U.S.C. §§ 101(3), (4), (13), (14), 102, 103.

The legislative history of the veterans' legislation also plainly demonstrates Congress' intent that dependents be beneficiaries of the legislation. In 1984, when the same Congress that enacted the Child Support Enforcement Amendments provided cost-of-living increases to disabled veterans, it wrote that its purpose was to assure "that the benefits authorized provide reasonable and adequate compensation for disabled veterans *and their families*." S. Rep. No. 604, 98th Cong., 2d Sess. 24, *reprinted in* 1984 U.S. Code Cong. & Ad. News 4479, 4488 (emphasis added).²⁴ Under these circumstances, it is highly im-

²⁴ Similarly, in 1980, Congress acknowledged that one of the functions of veterans benefits is to compensate the veteran's family for the loss of income as a consequence of his military service:

The purpose of this [survivor] benefit is to provide partial compensation to the designated survivors for the loss in financial support sustained as the result of the service-connected death. Income and need are not factors in determining a surviving spouse's or child's entitlement *since the Nation assumes, in part, the legal and moral obligation of the veteran to support the spouse and children.*

H.R. Rep. No. 1155, 96th Cong., 2d Sess. 7, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3307, 3313 (emphasis added).

probable that Congress intended that some of the express beneficiaries of the veterans benefit legislation—minor children of a disabled veteran—should be denied the support to which they are legally and morally entitled from their father merely because the only source of that support is his veterans benefits.

Finally, Appellant perceives a conflict between enforcement of a state court child support award and the anti-attachment provisions of the veterans benefit laws, 38 U.S.C. § 3101(a). The action taken by the Tennessee state court in this case clearly was not an “attachment, levy, or seizure” within the meaning of this provision. First, the court did not “attach, levy, or seize” those benefits. It simply held Mr. Rose in contempt for his failure to obey the court’s order to support his children. Contempt is but one of many state court remedies available for enforcement of support orders. As long as Veterans benefits are not attached, levied, or seized, the state may employ any of its enforcement measures without violating 38 U.S.C. § 3101(a). Second, the Tennessee court’s action does not contravene the purposes of Section 3101, which are to prevent the Veterans Administration from becoming a collection agency and to “prevent the deprivation and depletion of the means of subsistence of veterans dependent upon these benefits as the main source of their income.” S. Rep. No. 1243, 94th Cong., 2d Sess. 147-48, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5241, 5369-70. When the trial court awarded child support to Charlie Jr. and Caleb, it considered both the needs of the children and Mr. Rose’s ability to pay. Tenn. Code Ann. § 36-5-101(e). Thus, the trial court has already concluded that this award will not unduly burden Mr. Rose, while the failure to enforce it will almost certainly impoverish his young children.

CONCLUSION

For the reasons stated herein and in the briefs of Appellees Barbara Ann McNeil Rose and the State of Tennessee, this Court should affirm the decisions of the Tennessee state courts.

Respectfully submitted,

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APPENDIX

APPENDIX

INTEREST OF AMICI CURIAE

The Women's Legal Defense Fund (WLDF), a nonprofit membership organization based in Washington, D.C., was founded in 1971 to assist women in their efforts to gain equality under the law. In response to numerous requests for assistance on matters relating to child support, WLDF has instituted the Project to Implement Strategies to Equalize Child Support Responsibilities. Through this and other programs, WLDF provides technical assistance to attorneys, engages in nationwide fact gathering, analyzes current and proposed legislation and provides representation at the appellate level. In addition, WLDF worked closely with Congressional staff on the passage of the Child Support Amendments of 1984, and submitted comments on the implementing regulations proposed by the Department of Health and Human Services. In September 1986, WLDF sponsored a three-day conference on child support guideline development as part of WLDF's ongoing involvement in guideline development throughout the nation.

The Children's Defense Fund (CDF) is a national, public charity representing and providing advocacy on behalf of low income, minority and handicapped children. CDF was significantly involved in the enactment of the Child Support Enforcement Amendments of 1984 and continues to monitor their implementation.

Equal Rights Advocates, Inc. (ERA) is a San Francisco-based nonprofit legal and educational corporation dedicated to enforcing and promoting equal rights under the law for women. ERA has worked on numerous projects and issues that illuminate the hardships faced by divorced women who must support their children on salaries which, in general, are significantly lower than the salaries of men.

The NOW Legal Defense and Education Fund (NOW LDEF) is a not-for-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women, a membership organization of over 170,000 women and men in more than 725 chapters throughout the country. Family law, and in particular the economic rights of women in the family sphere, are a major focus of NOW LDEF's work. The organization has filed *amicus curiae* briefs on family law issues in numerous cases in state and federal courts. Cases in which NOW LDEF has filed *amicus curiae* briefs before this Court include *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), and *McCarty v. McCarty*, 453 U.S. 210 (1981).

Organization for the Enforcement of Child Support, Inc. (OECS), located in Maryland, is the oldest national child support advocacy group in existence. Formed in 1979, OECS is comprised solely of volunteers in more than twenty chapters dedicated to the enforcement of existing support orders and to seeking a more equitable distribution of parental assets to their children. OECS provides research and information through newsletters, telephone hot lines, workshops, seminars, general meetings and printed materials.

Parents Without Partners, Inc. (PWP) is an international nonprofit organization of 180,000 single parents nationwide and in Canada and Switzerland. It is the nation's largest and oldest mutual support organization for single parents, devoted to the welfare and interests of single parents and their children. PWP has worked for improved child support enforcement for a number of years, promoting better legislation, helping form a network of grassroots organizations, and providing a free hotline counseling service directly to parents.

Women's Equity Action League (WEAL) is a national nonprofit membership organization dedicated to securing

legal and economic rights for women, particularly within educational institutions, and to addressing the economic problems of women as they grow older. WEAL played an important role in the passage of the Economic Equity Act, which included provisions to insure adequate enforcement of child support obligations. WEAL conducts research, public education, administrative and legislative advocacy on the issues of social security, private pension reform, and insurance discrimination.

Association for Children for Enforcement of Support, Inc. (ACES) is dedicated to assisting disadvantaged children affected by parents who fail to meet legal and moral child support obligations. ACES has chapters in twenty-three states and has a total membership of ten thousand.

Child Support Action Network is a Colorado child support advocacy group with approximately 15 active members. The Network is involved in promoting public awareness and strengthening child support collection. The Network also acts as a support group and works for legislative change.

Child Support Task Force, based in Nebraska, is composed of approximately 25 members, most of whom are custodial parents. The Task Force is an advocacy group, involved in court monitoring, lobbying, legislative research and public education. The central concern of the Task Force is to insure that children have an equal opportunity to achieve the American dream.

For Our Children and Us, Inc. (FOCUS) is a New York nonprofit agency actively involved in ensuring that children receive the child support to which they are entitled. FOCUS has served over 12,000 clients.

Kids in Need Deserve Equal Rights (KINDER) is a child support advocacy organization based in Alabama. KINDER is composed of 25 active members and provides advocacy and information services.

Lawyers' Association for Women (LAW) is a professional organization comprised of over 200 members, both

women and men, who are lawyers, law students, and judges in the Middle Tennessee area. Among LAW's purposes are to promote the efficient administration of justice and the constant improvement of the law, especially as it relates to women and to participate as *amicus curiae* in litigation involving issues of concern to women.

Need for Support Enforcement (N-forSE) is Washington State's largest non-profit child support advocacy organization. N-forSE is headquartered in Bellevue, Washington with chapters in Whidbey Island and Olympia and members throughout the state. N-forSE has an active membership of over 300, and through television, radio and print media has influenced many residents of the state.

Parental Responsibility Organization (PRO) is a newly formed child support advocacy group in Indiana, providing referral services and public education. PRO's long term goal is to provide counseling for children, as well as for adults.

Parents Advocates for Children's Equal Rights, Inc. (PACER) is a nonprofit organization consisting of 1,500 members in Indiana. PACER is involved in court monitoring and provides parents with information on how to obtain child support.

Parents for Child Support Enforcement, a nonprofit organization based in Tuscaloosa, Alabama, is dedicated to ensuring the enforcement of child support awards. Parents for Child Support Enforcement engages in court monitoring and provides mutual support and counseling.

Parents for Enforcement of Court Ordered Support (PECOS) is a Connecticut organization composed of approximately 400 members, most of whom are custodial parents who are not receiving child support. PECOS' efforts are focused on ensuring enforcement of existing laws and on aiding the passage of stronger legislation.

PECOS acts as a support group, a referral agency and a source of information about child support.

Parents Organized for Support Enforcement, Inc. (POSE) is a Tennessee-based nonprofit child support advocacy organization. The objective of POSE is to educate custodial parents about their rights concerning child support enforcement on the state and federal level. POSE publishes a bi-monthly newsletter to keep parents, heads of enforcement agencies, assistant district attorneys, legislators and child support caseworkers informed of innovative collective techniques, child support case law, as well as existing and pending legislation. POSE has assisted over 400 custodial parents from thirty-six Tennessee counties.

Parents United for Lawful Support Enforcement, Inc. (PULSE), is a self-educating, peer support, nonprofit organization in Missouri formed by parents experiencing problems with enforcement of court-ordered child support awards. PULSE seeks to promote public awareness of the problems surrounding enforcement of child support and to serve as a source and guide for parents, legislators, courts and the general public on child support issues.

Parents United for Reform, Justice and Equality (PURJE) is a nonprofit volunteer organization in Pennsylvania. PURJE offers peer counseling, lawyer referral, and direct legal assistance in *pro se* child support cases. To date, PURJE has served approximately 200 men and women in child support cases.

Single Parents United 'N' Kids (SPUNK) is a California child support advocacy group which has approximately 250 active members and which provides an additional 1,000 to 1,500 mothers with information on how to collect their court-ordered child support.

SUPPORT is a nonprofit organization based in Pennsylvania. Founded in 1979, SUPPORT provides informa-

tion and assistance relating to child support award and enforcement issues in Family Court to clients unable to afford an attorney.

United for the Needs & Interests of Youth (UNITY) is a West Virginia nonprofit organization to help women going through divorce, separation, child support and custody cases. UNITY also works to serve the interests of the child in West Virginia and nationally, as part of a network of organizations with common interests. UNITY is represented on the West Virginia Governor's Child Support Enforcement Commission.

Virginians Organized to Insure Children's Entitlement to Support (VOICES) is an informal organization with approximately 50 members. VOICES provides information, referrals and moral support to custodial parents. In addition, VOICES is active in providing public education to the community.

Women's Equal Rights Legal Defense and Education Fund is a nonprofit California corporation organized to insure that women will be treated equally under the law. The Fund achieves its goals by educating women about their legal rights and assisting them in vindicating their rights by providing access to the courts. The primary goal of the Fund is to improve the enforcement of court-ordered child support.

AMICUS CURIAE

BRIEF

(10)

Supreme Court, U.S.
FILED
OCT 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1206

In The

Supreme Court Of The United States

OCTOBER TERM, 1986

CHARLIE WAYNE ROSE,
Appellant,

v.

**BARBARA ANN McNEIL ROSE AND
THE STATE OF TENNESSEE,**
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF
TENNESSEE, EASTERN DIVISION AT KNOXVILLE

**AMICUS CURIAE BRIEF OF THE STATE OF
CONNECTICUT, JOINED BY THE STATES OF
ALABAMA, ARKANSAS, DELAWARE, HAWAII,
KANSAS, MISSOURI, NEVADA, NEW JERSEY,
NORTH CAROLINA, NORTH DAKOTA,
PENNSYLVANIA, SOUTH DAKOTA, TEXAS,
UTAH, THE COMMONWEALTH OF VIRGINIA,
WASHINGTON, WYOMING AND
THE TERRITORY OF GUAM**

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QUESTION PRESENTED

Whether state courts have jurisdiction to consider veterans' disability benefits as a source of income when setting child support orders.

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**In The
Supreme Court Of The United States**

OCTOBER TERM, 1986

NO. 85-1206

CHARLIE WAYNE ROSE,
Appellant,

v.

**BARBARA ANN McNEIL ROSE AND
THE STATE OF TENNESSEE,**
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF
TENNESSEE, EASTERN DIVISION AT KNOXVILLE

**AMICUS CURIAE BRIEF OF THE STATE OF
CONNECTICUT, JOINED BY THE STATES OF
ALABAMA, ARKANSAS, DELAWARE, HAWAII,
KANSAS, NEVADA, NEW JERSEY, NORTH
CAROLINA, NORTH DAKOTA, PENNSYLVANIA,
SOUTH DAKOTA, TEXAS, UTAH, VIRGINIA,
WASHINGTON, WYOMING AND THE
TERRITORY OF GUAM**

IN SUPPORT OF THE APPELLEES

INTEREST OF AMICI CURIAE

This brief is submitted by the amici states, pursuant to Supreme Court Rule 36.4, in furtherance of their individual and collective sovereign interest in the continued development of sound child support enforcement law. This case provides the Court with an opportunity to affirm that the efficient and effective administration of the federal veterans' disability

benefits program need not, and would not, be compromised if states continue to deem such benefits available to disabled veterans when establishing child support obligations.

The amici states are clearly supportive of the decision of the Court of Appeals of Tennessee, Eastern Division, insofar as it reflects prior decisions of this Court which protect the sovereign rights of individual states to regulate and control domestic relations matters in their respective jurisdictions. However, the states have an equally compelling, if not stronger, interest in ensuring that the establishment and enforcement of reasonable child support orders can be accomplished in a timely and just matter, consistent with applicable federal constitutional and statutory law. Finally, the states are also interested in a construction of federal veterans' disability law which is wholly consistent with the intent of Congress when it chose to make such benefits available to such deserving and needy individuals.

Affirmance by this Court will not find disabled veterans subject to a benefit reduction. Nor will it impose any burden whatsoever on the Veterans Administration. In fact, it could well relieve the Administration of the need to entertain many child support controversies better left to the discretion of local domestic relations authorities. Reversal of the decision on appeal would find the states' plenary authority to regulate domestic relations matters subordinated to the role of the Veterans Administration and exacerbate a nationwide problem of child support enforcement that is so dependent on inter-governmental cooperation for the development of remedial approaches.

In the absence of congressional resolve to vest exclusive discretion in the Veterans Administration, as it relates to decisions affecting the disposition of disability benefits once granted, a condition precedent to invoking the federal Supremacy Clause, this Court should be particularly circumspect before altering the traditional role of local courts in the domestic relations area.

Courts in Connecticut are required by Conn. Gen. Stat. § 46b-84(b) to consider all sources of income available to both parents in setting amounts to be paid for child support. Most of the amici have similar statutes.¹

The Appellant and the United States as amicus curiae claim that state courts are precluded in a state domestic relations action from considering disability benefits paid to a veteran in determining the amount of support he is to pay for his children. Adoption by this Court of such a position would erode the traditional role of the states in determining family law matters.

Allowing states or spouses to seek reasonable child support orders, in the context of local divorce proceedings, when the support obligor receives disability benefits, does not expose the veteran to any greater degree of legal liability. The inability to seek court-ordered support could often find families forced on the state or local public assistance rolls in divorce proceedings pending final Veterans' Administration action on a request for apportionment of veterans' disability benefits pursuant to 38 U.S.C. § 3107(a)(2).

Thus, the amici have a vital interest in the proper resolution of the case presently before this Court.

¹ Ark. Stat. Ann. § 34-1211; Del. Code Ann. tit. 13, § 514 (1974); Hawaii Rev. Stat. § 580-47 (1984) amended by act of June 9, 1984, No. 332, § 2-7 and § 18, 1986 Ha. Laws; Kan. Stat. Ann. § 60-1610 (1986); Missouri § 454.86 R.S. Mo. (1984 supp.) Nev. Rev. Stat. § 126.265 (1983); N.J. S.A. 9-17-53; N.C. Gen. Stat. § 50-13.4; 23 Pa. C.S.A. § 4302 (1985); S.D. C.L. § 25-7-7 (1986); Tex. Fam. Code Ann. § 1405(a) (Vernon 1975); Utah Code Ann. § 78-45-7 (1953 as amended); Va. Code §§ 16.1-279 F and 20-107.2,2d; Wash. Rev. Code Ann. § 26.09.100 (1985); Wyo. Stat. § 20-2-113 (1977). (See also 45 C.F.R. 302.53 which requires a state IV D plan to provide that a state IV D agency will consider all earnings, income and resources of the absent parent in determining a support obligation)

SUMMARY OF ARGUMENT

The question presented is whether federal law deprives a state court of jurisdiction to consider veterans' disability benefits as a financial resource when establishing a child support order to be paid by a veteran — not whether a state court has the power: "to order child support payments to be *paid out of* federal veterans' disability benefits," as the United States contends, *Brief for the United States as Amicus Curiae* at (I). The Justice Department has attempted to frame the question presented to give the appearance of a seizure or garnishment, practices admittedly prohibited by 38 U.S.C. § 3101 and by the garnishment provisions of the Social Security Acts of 1975 and 1977 (42 U.S.C. §§ 659 and 662(f)(2)). However, this is clearly not a garnishment case.

Domestic relations law has traditionally been within the exclusive control of the states. This Court has allowed intrusions into this domain only on rare occasions and only when a state family law statute has done grave injury to clear and substantial federal rights. Including veterans' disability benefits as income during state court calculations of child support awards presents no threat to any federal interest.

Permitting garnishment of federal benefits is the result of statutory exemption from established rules of sovereign immunity. Admittedly the Social Security Act permits garnishment of military pay and military retirement benefits, yet does not permit garnishment of veterans' disability benefits; however, it does not follow, as argued by the Appellant and the Justice Department, that courts cannot consider income from these disability benefits in establishing child support awards. Although the amici states agree with the Appellant that veterans' disability benefits cannot be divided under community property laws, that does not mean that a state court cannot consider income from these benefits in setting support awards as the Appellant and the Justice Department state. A decision of the Administrator of Veterans Affairs on matters relating to veterans' benefits is not subject to judicial

review; however, a state court is not subjecting the Administrator to judicial review when the court considers a veteran's benefit in setting a child support order. Although the Administrator may apportion veterans' disability benefits between the veteran and his dependent, it does not follow, as maintained by the Appellant, that when no apportionment has been made or requested, a state court cannot consider these benefits as income in setting an amount to be paid by the veteran as child support.

No legislative history supports the proposition that veterans' disability benefits cannot be considered as income by a state court entering child support orders; rather, it appears the Appellant and the United States express a lack of confidence in state courts to enter fair and equitable child support orders when disabled veterans are before those courts, although, as in this case, all such orders are subject to appellate review if appeals are timely taken. In fact, the Appellant did not seek appellate review of the judgment which fixed the child support order, but sought such review only as a result of contempt proceedings instituted upon his failure to obey the order of the court.

The State of Connecticut as amicus curiae, joined by sister states, maintains that the Supremacy Clause cannot be invoked in this case because federal legislation does not bar a state court from considering veterans' disability benefits as one source of income in determining the amount of child support a veteran should pay. Furthermore, Congress has repeatedly sought to provide the states with additional tools for the collection of child support from non-custodial parents, and this Court's adoption of the position taken by the Appellant and the United States would tend to negate those efforts.

ARGUMENT

THE SUPREMACY CLAUSE DOES NOT PROHIBIT INCLUSION OF VETERANS' DISABILITY BENEFITS IN STATE COURT CALCULATIONS OF CHILD SUPPORT OBLIGATIONS.

A. Jurisdiction Over Domestic Relations Matters Has Traditionally Been Left To The States.

This Court has long recognized that the whole subject of domestic relations law is within the control of the states and not within the control of the federal government. *In re Burrus*, 136 U.S. 586, 593-94 (1890). *Accord Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979). Federal courts hesitate to assert jurisdiction over family matters, but on the infrequent occasions when they do, the Supremacy Clause of the United States Constitution allows only limited review: a federal court must find that Congress has "positively required by direct enactment" that the state law be preempted. *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904). "A mere conflict in words is not sufficient" to trigger preemption. *Hisquierdo*, 439 U.S. at 581. To be overridden, the family law statute of the state must do "major damage" to "clear and substantial" federal interests. *Id.* (quoting *United States v. Yazell*, 382 U.S. 341, 352 (1966)). Thus, this Court has developed a narrowly drawn exception to the principle that the states retain jurisdiction over family law questions.

The narrowly drawn exception is not applicable to the present case. Congress has not articulated in a positive manner that states are precluded from including veterans' disability benefits as income when calculating child support obligations. Such computations pose no grave danger to clear and substantial federal interests.

Connecticut law requires that both parents share the obligation for maintenance of their minor children. Conn. Gen. Stat. § 46b-84(a); *Guille v. Guille*, 196 Conn. 260, 492 A.2d 175 (1985). In fashioning support orders, Connecticut courts weigh both the needs of the children and the respective abilities of the parents to pay. Conn. Gen. Stat. § 46b-84(b); *Timm v. Timm*, 195 Conn. 202, 487 A.2d 191 (1985). Courts must consider:

the age, health, station, occupation, earning capacity, amount and sources of income, estate, vocational skills and employability of each of the parents, and the age, health, station, occupation, educational status and expectation, amount and sources of income, vocational skills, employability, estate and needs of the child.

Conn. Gen. Stat. § 46b-84(b) (emphasis added).

Connecticut courts, and the courts of the states joining in this amicus brief, are required by statute to consider all sources of parents' income in setting child support awards.²

Most other states have statutes of long standing requiring consideration of all parental financial resources. *See supra* footnote 1. The Tennessee statute in question in this case, Tenn. Code. Ann. § 36-5-101(3), requires that state courts include "[t]he earning capacity, obligations and needs, and financial

² Connecticut support statutes requiring consideration of all financial resources from both parents date from at least 1888:

Upon the dissolution of any marriage by divorce, the parents of a minor child of such marriage, who is in need of maintenance, shall maintain it according to their respective abilities, and upon the complaint of either parent, then or thereafter made to the superior court, it shall inquire into their pecuniary ability, and may make and enforce such decree against either or both of them, for the maintenance of such child as it shall consider just, and may direct any proper security to be given therefor.

See Conn. Gen. Stat. § 2812 (1888), the predecessor of Section 46b-84(b).

resources of each parent" when establishing the appropriate amount of child maintenance. By the same token no exclusions for disability benefits occur in any of the child support statutes of the states joining this amicus brief.

Some state courts have ruled that veterans' disability benefits are not exempt from consideration in determining the amount a non-custodial parent should pay for child support.³ Also, the Veterans Administration originally took the position that veterans' disability benefits could be considered by a state court in establishing a child support order payable by a veteran.⁴

³ See, e.g., *Cohen v. Murphy*, 368 Mass. 144, 330 N.E.2d 473 (1975); *Parker v. Parker*, 335 Pa. Super. 348, 484 A.2d 168 (1984); *Dillard v. Dillard*, 341 S.W.2d 668 (Tex. Civ. App. 1960); *Pishue v. Pishue*, 32 Wash. 2d 750, 203 P.2d 1070 (1949).

⁴ The following excerpt appeared in the May, 1986 issue of *Clearinghouse Review*:

Rules on how different benefits are to be apportioned vary with the benefit program. Sometimes an issue is raised as to whether VA disability compensation is considered earned income that should be considered as part of the veteran's resources in determining the veteran's ability to pay child support. According to a December 5, 1985, letter from the VA General Counsel, a court of competent jurisdiction has the authority to base the amount of a parent's child support obligation on income and assets from whatever source derived, including VA benefits. Whether or not VA benefits are includable for purposes of such calculation is a matter of state law in the relevant jurisdiction.

20 *Clearinghouse Rev.* 15, 16 (May 1986). The amicus brief of the United States in this case presents a position contrary to that expressed by the Veterans' Administration's General Counsel.

B. This Court Has Not Precluded State Courts From Considering Veterans' Disability Benefits As Income When Establishing Child Support Orders To Be Paid By A Veteran.

The United States in its amicus brief incorrectly relies on decisions from this Court regarding sovereign immunity from garnishment. *Brief of the United States as Amicus Curiae* at 18 n.20 (citing *Buchanan v. Alexander*, 45 U.S. (4 How.) 20 (1846), and *Smith v. Jackson*, 246 U.S. 388 (1918)). In *Buchanan*, the Court held that seamen's wages retained by a federal official were governmental funds protected by sovereign immunity from attachment by creditors. 45 U.S. (4 How.) at 20-21. The Court held in *Smith* that a government official was without specific Congressional authority to withhold sums from the salary of a federal judge. 246 U.S. at 390-91. In both these cases, the funds involved had been specifically appropriated by Congress and were thus, in the absence of an explicit Congressional waiver, protected from attachment or garnishment by sovereign immunity. As we have stated previously, the present controversy is not one involving attachment or garnishment, and, therefore, sovereign immunity principles are not applicable when state courts merely include veterans' disability benefits as a source of income when shaping child support orders, any more than such principles would be applicable if a court considered a judge's salary or seamen's wages in determining an amount to be paid by a non-custodial parent for child support.

The Justice Department also cites *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979) and *McCarty v. McCarty*, 453 U.S. 210 (1981), in its attempt to characterize the present case as one involving garnishment. These cases are clearly distinguishable from the instant controversy. In *Hisquierdo*, this Court ruled that Railroad Retirement Act benefits accrued during marriage are not subject to division as community property during a California dissolution. 439 U.S. at 590. The Court found that Congress explicitly shielded such benefits from inclusion in marital community property.

Id. at 584-85. Moreover, the Court noted that the Act draws a distinction between use of the federal benefits for child and spousal support orders and for community property determinations. According to the Court, the former are based on need, while the latter are not. *Id.* at 587. In *McCarty*, this Court held that federal law exempted military retirement pay from division under California community property laws. 453 U.S. at 235-36. The Court again noted that rights to child support and alimony, on the one hand, and community property claims, on the other, are fundamentally distinct. *Id.* at 230 (citing *Hisquierdo*, 439 U.S. at 587).

Hisquierdo and *McCarty* are inapposite to the present case. There is no direct and unequivocal enactment by Congress allowing interference with the States' power to establish child support obligations which include veterans' disability benefits as a factor in court calculations. Until Congress makes it manifestly clear that it intended to preclude veterans' disability benefits as a resource in setting child support obligations, the basic police power of the states to regulate domestic relations should not be altered by this Court.

C. Congress Did Not Intend That State Courts Be Precluded From Considering Veterans' Disability Benefits As Income When Determining Child Support To Be Paid By A Veteran.

Congress has created a program that compensates military veterans for service-related disabilities. 38 U.S.C. §§ 301-362. The benefits paid to a disabled veteran create no vested rights in the recipient; they are gratuities and may be revoked by Congress at any time and for any legislatively mandated reason. *De Rodulfa v. United States*, 461 F.2d 1240, 1257-58 (D.C. Cir.), *cert. denied*, 409 U.S. 949 (1972). Such disability benefits are intended not only for the use of the disabled veteran, but also for the use of his or her family. *State ex rel. Eastern State Hospital v. Beard*, 600 P.2d 324 (Okla. 1979); *Parker v. Parker*, 335 Pa. Super. 348, 484 A.2d 168 (1984).

Disability does not terminate an affected parent's child support obligation; the disability merely alters the extent to which the parent can perform it. *Schlaefter v. Schlaefter*, 112 F.2d 177, 185 (D.C. Cir. 1940). In the absence of an explicit federal provision exempting veterans' disability benefits, there is no compelling reason why such benefits should be excluded as a financial resource when state courts set appropriate support orders.

Section 459(a) of the Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337, 2357-58 (1975), permits the garnishment of military pay and military retirement pay for the satisfaction of child support and alimony obligations.⁵ This statute thus creates an exception to the general principle of sovereign immunity, which exempts from garnishment government funds payable to individuals. In a definitional provision, 42 U.S.C. § 662(f)(2), veterans' disability benefits are specifically protected from garnishment.⁶

⁵ The statute states in pertinent part:

Notwithstanding any other provision of law . . . moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States . . . to any individual, including members of the armed forces, shall be subject, in like manner and to the same extent as if the United States . . . were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

42 U.S.C. § 659(a).

⁶ 42 U.S.C. § 662 (emphasis added) states in pertinent part:

For purposes of section 659 of this title—

(f) Entitlement of an individual to any money shall be deemed to be "based upon remuneration for employment", if such money consists of—

(continued)

But Congress, by precluding garnishment of such disability benefits, or by not providing for a statutory exception to the principle of sovereign immunity thereby precluding seizure of seamen's wages in *Buchanan v. Alexander, supra*, or a judge's salary in *Smith v. Jackson, supra*, did not intend to prevent state courts from considering any of these sources of income when establishing child support orders to be paid by a non-custodial parent.

The Appellant and the United States rely on three provisions of Title 38 of the United States Code in making their argument that states lack jurisdiction over the use of veterans' disability benefits as income in setting child support orders. 38 U.S.C. § 211(a) states:

[T]he decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

⁶ (continued)

(2) periodic benefits . . . which provides for the payment of pensions, retirement or retired pay, annuities, dependents or survivors' benefits, or similar amounts payable on account of personal services performed by himself or any other individual (not including any payment as compensation for death under any Federal program, any payment under any Federal program established to provide "black lung" benefits, any payment by the Veterans' Administration as pension, or any payments by the Veterans' Administration as compensation for a service-connected disability or death, . . .), and does not consist of amounts paid, by way of reimbursement or otherwise, to such individual by his employer to defray expenses incurred by such individual in carrying out duties associated with his employment.

The Appellant and Solicitor General would have the Court believe that this provision grants the Administrator of Veterans' Affairs sole discretion concerning disability benefits. Although it is true that only the Administrator of Veterans' Affairs can apportion veterans' disability benefits by payment of a portion of the benefits to a dependent, it does not follow that when the benefits are not apportioned by the Veterans' Administration, a state court cannot consider such benefits in determining the amount of a child support order. When state courts use veterans' disability benefits as income in determining the amount of child support to be paid by veterans, these determinations do not subject the Administrator to judicial review of his decisions. These determinations also do not frustrate the dual purposes underlying section 211:

- (1) To insure that veterans' benefits claims will not burden the courts and the Veterans' Administration with expensive and time-consuming litigation, and
- (2) to insure that the technical and complex determinations and applications of Veterans' Administration policy connected with veterans' benefits decisions will be adequately and uniformly made.

Johnson v. Robison, 415 U.S. 361, 370 (1974).

Most child support litigation is neither time-consuming nor overly technical and complex. In addition, it is not anomalous that Congress excluded state courts from section 211(a): state courts, rather than federal courts, exercise almost exclusive control over domestic relations law. *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979). Nothing in section 211(a) prevents state courts from using veterans' disability benefits as income in child support computations.

The Appellant and the United States cite 38 U.S.C. § 3107(a) to support their argument that only the Administrator can apportion disability benefits and that the Appellee failed to seek this administrative remedy. The statute states in pertinent part:

(a) All or any part of the compensation, pension, or emergency officers' retirement pay payable on account of any veteran may—

(2) if the veteran is not living with the veteran's spouse, or if the veteran's children are not in the custody of the veteran, be apportioned as may be prescribed by the Administrator.

38 U.S.C. § 3107(a)(2). There is nothing in this provision to divest state courts of jurisdiction to consider veterans' disability benefits as a resource in child support matters. The use of the phrase "may . . . be apportioned . . . by the Administrator" merely grants the Administrator non-exclusive authority to divide such benefits. The Appellee's decision to seek relief in a state court rather than from the Administrator does not bar her claim. She chose an appropriate alternative for securing a support order which would include veterans' disability benefits as a resource.

One cannot argue that courts cannot consider veterans' disability benefits in setting a child support award on the ground that 38 U.S.C. 3101(a) exempts veterans' disability benefits from "attachment, levy or seizure by any legal or equitable process whatever," since government funds payable to an individual are always exempt from such seizure under the principle of sovereign immunity, unless there is a statutory exception to this principle, *Buchanan v. Alexander, supra*; *Smith v. Jackson, supra*. Although veterans' benefits are exempt from garnishment under the principle of sovereign immunity, it does not follow that state courts cannot consider such benefits in setting child support orders, and in enforcing such orders through the contempt powers of the court.

Congress has repeatedly expressed its intent to provide assistance to the states in their efforts to establish and enforce adequate child support orders against non-custodial parents. Responding to a growing national problem of parental non-support, and to lax state enforcement of support

obligations, Congress created the Child Support and Paternity Program in the Social Services Amendments of 1974, Pub. L. No. 93-647, § 101, 88 Stat. 2337, 2351-2361 (1975). The new program, enacted as Title IV-D of the Social Security Act, is codified at 42 U.S.C. §§ 651-667. Congress authorized federal financial support for state programs designed to encourage the timely and efficient enforcement of child support obligations. See S. Rep. No. 93-1356, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 8133. Under Title IV-D, the states bear primary responsibility for child support matters. Removing veterans' disability benefits from consideration as income in shaping child support awards would greatly hamper the states' federally mandated duty to seek child support from all non-custodial parents.

CONCLUSION

That, "[T]here is a clear national obligation to provide for those disabled in military service to their country," *Brief of the United States as Amicus Curiae* at 5, cannot be disputed. Disabled veterans deserve the gratitude of the nation. Indeed, the nature of the disability suffered by the Appellant is such that his basic veterans disability benefits have been supplemented with a monthly aid and attendance allowance which recognizes his need for constant assistance in performing essential personal functions. However, the issue in this case is not whether the monthly disability payments received by the Appellant, principally veterans disability payments, are sufficient to meet his subsistence needs and family support obligations. Rather, the only real issue for the consideration of this Court, albeit a most important one, is whether state courts are precluded from considering such benefits as being available to a child support obligor in issuing child support orders incident to a local divorce proceeding.

For the reasons stated in this brief, the judgment of the Court of Appeals of Tennessee, Eastern Division, should be affirmed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

No. 85-1206

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1986

CHARLIE WAYNE ROSE,
Appellant,

v.

BARBARA ANN McNEIL ROSE AND
STATE OF TENNESSEE,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF TENNESSEE, EASTERN DIVISION

BRIEF FOR THE STATE OF CALIFORNIA, THE
APPELLATE COMMITTEE OF THE CALIFORNIA
FAMILY SUPPORT COUNCIL, THE APPELLATE
COMMITTEE OF THE CALIFORNIA DISTRICT
ATTORNEYS' ASSOCIATION, THE NATIONAL
CHILD SUPPORT ENFORCEMENT ASSOCIATION,
AND THE MINNESOTA COUNTY ATTORNEYS'
ASSOCIATION AS AMICI CURIAE
SUPPORTING APPELLEES

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QUESTIONS PRESENTED

(1) Whether the Supremacy Clause (U.S. Const. Art. VI, Cl. 2) deprives state courts of subject-matter jurisdiction over the issue of the amount of child support which should properly be awarded when a disabled veteran is the noncustodial parent; and (2) whether a state court child support order can be enforced against a recipient of veterans' benefits by means other than garnishment.

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INTEREST OF AMICI CURIAE

The resolution of this case may affect the prerogative of state courts to consider veterans' benefits in setting child support orders, and certainly will determine whether such child support orders may be effectively enforced where veterans' benefits are a substantial portion of the income of the absent parent. *Amici curiae* are directly interested in the resolution of these questions in that the State of California has in place a child support enforcement program in compliance with Title IV-D of the Social Security Act, 42

U.S.C. sections 651 et. seq.; the California Family Support Council is composed of deputy district attorneys and administrators of California child support enforcement programs under Title IV-D; the California District Attorneys' Association is the umbrella organization for all district attorneys in the state; the National Child Support Enforcement Association is a national organization whose mission is the efficient and effective enforcement of support; and, the Minnesota County Attorneys' Association is the umbrella organization for Title IV-D attorneys in the state of Minnesota.

Because of the many child support cases handled by these agencies which concern veterans, all *amici curiae* have an interest in the resolution of the question of whether federal law preempts state law in these matters. The State of California, furthermore, has a compelling interest in preserving its traditional authority over domestic relations and in protecting the independence and sovereignty of its judicial system.

SUMMARY OF ARGUMENT

The question as presented by Appellant, and also as posited by the Solicitor General as *amicus curiae*, does not properly define the issues before this court. It goes beyond the limited facts reviewed below, and ultimately presents two questions: (1) Whether the Supremacy Clause, U.S. Art. VI, Cl. 2, deprives state courts of subject-matter jurisdiction over the issue of the amount of child support which should properly be awarded when a disabled veteran is the noncustodial parent, i.e. whether veterans' benefits can be considered as a resource available to the obligor when a

state court establishes a support order, even though those benefits are exempt from execution; and, (2) whether a state court child support order can be enforced against a recipient of veterans benefits by means other than garnishment. i.e. whether the Supremacy Clause preempts state enforcement procedures of any kind other than attachment or garnishment.

As will be pointed out, *infra*, veterans benefits can be considered as available income when state courts set child support orders payable by a veteran who is a noncustodial parent. Federal preemption in this area would lead to challenges to state court orders in all cases where the obligor receives veterans' disability benefits. Existing orders directing veterans to pay child and spousal support, which must number in the hundreds of thousands nationwide, would be subject to being reopened and relitigated. If appellant prevails, nearly all of these orders extant may be void or at least will be voidable. Even if the obligor was not receiving disability benefits at the time he or she was ordered to pay child support, a logical extension of appellant's reasoning herein would dictate that as of the time of an award of disability payments, the state court would cease to have full jurisdiction over the matter of support and that authority would shift to the Veterans Administration.

We submit that the only prohibition under federal law which impacts state courts in these cases is the protection against garnishment or levy which Congress specified for veterans' disability benefits. The purpose of that protection was to assure continuous support for families and veterans who had made such noble sacrifice in the service of their country. The disability benefit replaces the veteran's loss

of earning potential; it most assuredly was not intended as a shield under which he or she might hide to avoid the legal and moral duty to support his or her children. It is demeaning to veterans to suggest that they would shirk their lawful responsibilities by keeping their disability pay entirely for their own use and providing none of it for their childrens' support.

The state of the law for the past forty-five years has been that the exemption created by 38 U.S.C. 3101(a) did not apply to alimony and child support, and Congress had numerous opportunities to "correct" that interpretation of the law. There is no indication anywhere that Congress intended apportionment to substitute for state court action; certainly there is no "positive and direct enactment" which would result in the preemption urged by the appellant. In fact, Congress has never addressed the question of whether or not state courts could consider veterans' benefits in setting support awards. The only pertinent legislation enacted restricts the use of certain judicial or administrative enforcement mechanisms.

ARGUMENT

I

STATE COURTS MAY CONSIDER VETERANS' DISABILITY BENEFITS IN SETTING CHILD SUPPORT ORDERS

By mischaracterizing the issues, counsel, both for the United States and the Appellant, have blurred the distinction between considering veterans' benefits for the purpose of *establishing* a child support order and *enforcing* that order by compelling payment out of exempt funds. The distinction, however, has not been lost on the Veterans Administration itself. In their General Counsel opinion OP. G.C.

4-84 "Authority of Veteran's Guardian to Comply with Court Ordered Spousal Support" (August 28, 1984), the General Counsel explicitly recognized the subject-matter jurisdiction of a California court to establish a child support order pursuant to waiver. In allowing the guardian of an incompetent veteran to waive the exemption of 38 U.S.C. 3101(a), the Veterans Administration conceded subject-matter jurisdiction over the issue of child support while simultaneously arguing that *forced collection* of alimony from the veteran's benefits would violate the preemption doctrine set forth in *Hisquierdo v. Hisquierdo* (1979) 439 U.S. 572. Even more importantly, in a letter of December 6, 1985, the General Counsel of the Veterans Administration dealt with the question of whether Veterans Administration compensation is considered earned income for the purposes of setting a child support order:

"The term 'earned income' is generally used in the context of taxability, but this is not the case with veteran's [sic] benefits. VA disability compensation is not subject to Federal income taxation, 26 U.S.C. section 104(a)(4), nor, generally, is it subject to garnishment, 38 U.S.C. section 3101(a). Nevertheless, a court of competent jurisdiction has the authority to base the amount of a parent's child support obligation on income and assets from whatever source derived, including VA benefits. Whether or not VA benefits are includable for purposes of such calculation is a matter of State law in the relevant jurisdiction. The VA cannot intercede in a State court domestic relations proceeding unless a Federal question is presented. *Hisquierdo v. Hisquierdo*, 429 [sic] U.S. 572, 581 (1979). Therefore, even though the Federal Government does not tax [recipient's] VA benefits, and the law protects them from direct garnishment, a State court may consider the same benefits as part of his resources in determining the extent of his ability to pay child support." 6 *Veterans Rights Newsletter* 2 (May-June, 1986).

The position of the General Counsel of the Veterans Administration is thus directly at odds with the position of the Solicitor General. Clearly, the General Counsel understands the distinction between considering veterans benefits for the purpose of *setting* child support awards as opposed to *enforcing* such awards by execution against veterans benefits. As will be illustrated below, that distinction is crucial.

The position of the Veterans Administration that veterans benefits can be considered in child support awards has further support in a General Counsel opinion available to the public at the Veterans Administration Central Office, see *VADEX*, July, 1986, page 0173: "38 U.S.C. 3101(a) doesn't preclude a state court or state statute from considering income from VA compensation 'for any purpose whatsoever.'" This opinion, issued January 12, 1982, by the General Counsel, concerned a Montana court which had considered VA benefits in an equitable distribution of marital property. The General Counsel distinguished the case then at bar from *In re Marriage of Milhan* (1980) 27 Cal.3d 765, vacated 453 U.S. 918, because *Milhan* would apparently have required the VA to pay over to the former wife, month by month, her community property share of her former husband's contribution. The General Counsel pointed out that in *Milhan* the benefits themselves were in issue, whereas in the case at bar, they were not, "rather, they were only one of several factors used by the Montana divorce court in arriving at its 2 to 1 ratio." The General Counsel noted:

"In our view, neither section 3101(a) nor any other section of title 38 precludes a state court or state statute from considering income from VA compensation as a factor in an appropriate case, provided that the benefits themselves are not taken away from the entitled veteran except as provided by Federal law."

Mr. Rose and the Solicitor General argue that his benefits are a "gratuity" and as such are exempt from consideration (Brief for Appellant at 31, Brief for the United States as Amicus Curiae Supporting Appellant at 8). The characterization of such benefits as "gratuities" is inaccurate and misleading in the light of *Goldberg v. Kelly* 397 U.S. 254, 262 n.8 (1970); see *Fielder v. Cleland*, 433 F. Supp. 115 at 120-121 (E. D. Mich., 1977) (where VA benefits were accurately described as entitlements, subject to the due process clause.) Frankly, even a gratuitous benefit (a gift, lottery winnings, payments from a spendthrift trust, or whatever) is nonetheless a resource available to the obligor to pay for his own necessities of life or to be used to satisfy his lawful obligations. It defies reason and common sense not to consider the existence of such a resource when determining ability to pay child support. The VA position that disability benefits may be considered in setting child support awards reflects reality.

The second element of appellant's argument is that "Congress had in mind that the Administrator is in a better position than State courts to weigh the needs of the family against the personal maintenance needs of the disabled veteran." (Brief for Appellant at 36.) Indeed, Congress has enacted legislation to set the precise compensation rates the Veterans Administration can provide as maintenance for the veteran and his dependents; but it is ridiculous to assume that Congress would have intended the \$99 per month dependents' benefit which Mr. Rose pays over to his family as the full extent of his liability for their support. Every family's situation is different. State courts, accustomed as they are to dealing with every facet of domestic relations, are in a far better position than the Veterans Ad-

ministration to assess the relative needs of the parties and each parent's ability to support his or her children.

Since the Veterans Administration itself so clearly endorses state courts considering VA benefits when establishing a support order, *amici curiae* believe that it is unnecessary to elaborate further on the inherent logic in leaving child support determinations in the family courts where they have always been and where they belong. We would, however, point out the inevitable chaotic results in the state courts should they be forced to ignore veterans benefits in the process of establishing support orders. For example, as noted in the Veterans Administration Annual Report (1985) at 75 there were 2,240,277 veterans then receiving disability compensation. If only ten percent of this group were subject to support orders, a number roughly equivalent to one-third of Vietnam veterans receiving compensation, *Ibid.*, there would be potential motions to reconsider over 200,000 state court support orders, and, likewise, 200,000 claims for apportionment.¹ Yet the VA has only 27,263 apportionment cases. Brief of the United States as Amicus Curiae Supporting Appellant, n12 at 11. Obviously, support matters concerning veterans dependents are handled almost exclusively by the courts. This is demonstrably *not* an area in which the Veterans Administration has any special competence or expertise, nor much inclination to become involved.

It is easy to imagine that the Veterans Administration could spend a substantial portion of its time and re-

¹ The number of separated or divorced veterans as of the 1980 census was 2,699,400. *Veterans in the United States*, VA Report No. IM & SM 70-84-5 (October 1984) at 20.

sources doing nothing but evaluating apportionment claims of the families of divorced veterans if state courts were deprived of their power to make realistic orders in cases where disability benefits were paid. Will the Veterans Administration, for example, entertain requests for modification of apportionment as state courts will whenever parties' circumstances change? Will they enforce custody and visitation orders by varying apportionment? We should be cautious before relegating support issues to the Veterans Administration particularly in light of the V.A.'s stated position. It is patently obvious that the Veterans Administration has not usurped this area of the law over which appellant claims that Congress has given it responsibility.

It appears that apportionment is intended to provide a means for families to obtain support when their state court remedies have failed, or in situations where they are inapplicable, as for instance, when the parties have separated but no suit for divorce has been filed. Apportionment, like dependents' allotments for the active service, is an administrative auxiliary support mechanism which is appropriate under certain circumstances, but surely is not intended to replace judicial support establishment and enforcement.

II

CHILD SUPPORT OBLIGATIONS MAY BE ENFORCED BY MEANS OTHER THAN ATTACHMENT AND EXECUTION

We must remember the facts of the case before us in deciding whether or not the underlying divorce decree and the contempt judgment are valid. It is undisputed

that the parties were lawfully married March 4, 1973 (R.2, R.5). As of July, 1983, the two children of the parties were ages nine and six respectively. (*Ibid.*)² The final decree of divorce of October 25, 1983, reflects that the defendant did not appear at trial (R.8), nor did he appeal the divorce decree. At the time of the contempt hearing on May 9, 1984, the court based its contempt finding in part upon the fact that Mr. Rose and his wife had each received \$12,000.00 from the sale of a home following the divorce (RT 18:14-18). According to Mr. Rose's counsel, after he paid off some bills, \$7000.00 remained (RT 6:7-8). As a result, there was \$7000.00 in clearly nonexempt funds available to purge Mr. Rose of his contempt. See *Carrier v. Bryant* 306 U.S. 545 (1939). There is no doubt that Mr. Rose was apprised of his child support obligation, and that he had the means to comply with the court order. However, he chose instead to make a belated attack on the validity of the divorce decree rather than attempt to justify his refusal to support his family. Thus, in order to attack the contempt finding, his counsel of necessity has blurred the distinction between the jurisdiction of the court to order child support in the first place, and the court's power to enforce that order by citation for contempt. As stated above, *amici curiae* believe there is no substantial question that the state court had the power to consider Veterans Administration benefits in setting the award, and that the divorce decree is thus valid. The only issue

² Mr. Rose apparently assumed the responsibility of a family after his disability. His counsel notes that his injuries occurred in action in Vietnam (Brief for Appellant at 19); the Vietnam truce was effective January 27, 1973 (*New York Times*, January 28, 1973, 1:8) and the marriage and conception of these children occurred thereafter.

is whether punishment for contempt may be used as a means to enforce payment of child support thus ordered.

In enforcing the award, the court should consider only whether the accused contemnor was aware of his obligation to comply with the order and whether or not his failure or refusal to comply was willful. In making the latter determination, the court should consider not only Veterans Administration benefits but also any nonexempt funds remaining, including the \$281 per month in Social Security benefits which are clearly not exempt, plus the \$7000.00 balance from the house proceeds and any other property or assets which Mr. Rose possessed. It is erroneous to argue as Appellant does that the support "can only be paid from veterans' disability benefits" (Brief for Appellant at 25), or to state "this Court should hold that State courts are without subject matter jurisdiction to order payments of any kind which can only be paid from a veteran's disability benefits. . . ." (*Id.* at 39), because Mr. Rose had sizable non-exempt assets.

The real question in this case is whether the exemption protecting the veteran, 31 U.S.C. 3101(a), prevents enforcement of a child support order by contempt when, arguably, it would be necessary to use Veterans Administration benefits to purge the contempt. That question, as noted above, is blurred by the fact of Mr. Rose's substantial non-exempt assets, but the Court may nonetheless presume that there is, at least, a strong possibility that the Tennessee court intended that sooner or later VA benefits should be used to support the children. In deciding whether Federal law preempts state law in this case, the crux of the question is deciding what the intent of Congress was when it allowed military salaries and benefits

based upon employment to be subject to levy of execution but exempted a veteran's disability pay from similar execution. (A veteran's pension obtained in lieu of a partial waiver of military retirement pay is not so exempted. 42 U.S.C. section 662(f)(2)).

When Congress enacted public law 93-647 (Social Services Amendments of 1974), did it intend that the children of disabled veterans would have no way of enforcing state court child support orders by means other than execution? Was there the slightest indication that Congress intended by exempting certain benefits from execution that existing orders or orders rendered in the future affecting these veterans' obligations to support their children should not be based upon all income, assets or resources at the obligee's disposal?

It should be remembered that the obligation to support one's children is imposed by law and is not a debt in the usual sense. If this Court were to hold that Federal law preempts the rights of states to order child support and enforce such orders by means short of execution upon the benefits themselves, it would do drastic damage to families across the country. As opposed to alimony, which may be based on considerations such as fidelity, what went into the marital relationship, what came out, abuse, neglect, etc., child support is purely a matter of the child's need and the parents' ability to provide. If the VA benefits may be considered in setting the awards, as the Veterans Administration General Counsel opinions, *supra*, allow, then contempt should be available as an enforcement remedy. Even the Solicitor General concedes that the state court has the "*power to consider the veteran's total income, including his VA benefits, in determining the amount*

of child support to be paid from any other income he may have." (Brief of the United States as Amicus Curiae Supporting Appellant, n.13 at 12.) Thus, in this case, the state court could have appropriately ordered appellant to pay any sum up to \$281 a month. The Solicitor General goes on to suggest that "... it would then also be appropriate for the Administrator to consider that state court order in deciding how much *if any*, of the appellant's VA disability benefits should be apportioned to his children (*Ibid.*; emphasis added)." If the state court order was limited to only \$281 per month for those two children, it is obvious to *amici* that *nothing would be apportioned*. Perhaps inadvertently revealed here is the "reality" of the apportionment system as construed by appellant. In essence, no support can be ordered from the disability benefits because apportionment is available for the dependents' support, and no apportionment will occur because support will be paid solely out of the non-VA income. *Amici* submit this argument fails by reductio ad absurdum.

It should further be noted that under the laws of every state of which *amici curiae* are aware, failure to support one's children, without valid cause, is a crime punishable by fine and/or imprisonment. While one cannot help but be sympathetic to the situation of the appellant in this case, is this court going to say as a matter of law that prosecuting attorneys throughout the nation may under no circumstances prosecute a veteran (e.g., disabled or a GI Bill recipient) who has deserted his family? To grant appellant's argument would be to provide Mr. Rose, and other disabled veterans who will not support their children, with *lifetime immunity* from crim-

inal prosecution for nonsupport. Under no stretch of the imagination can that be construed as what Congress intended.

If appellant prevails, we will be confronted with many more of the situations eloquently described by Justice Budge in dissent in *In re Irish* (1932) 51 Idaho 604, 9 P.2d 501 at 504.

"The record displays a consistent willful intent on the part of petitioner to refuse to comply with the order of the court or concern himself as to the welfare of his children. He has not paid a thin dime for the support of his children for the last three years . . . He does not and cannot deny that he can borrow the money upon his adjusted compensation certificate, but urges indebtedness to certain creditors. His first obligation is to his children, but he relegates them to the rear and insists that his first duty is to hold his adjusted compensation certificate for his own protection and needs . . . To hold that he can claim as his own and for his sole benefits [sic] the moneys which he might realize on said certificate, which might be used to furnish sustenance and pay for medical attention for his own flesh and blood, and use his salary to meet creditors' demands, to the exclusion of the rights of his minor children, is not to my mind in keeping with common justice."

The only sensible resolution of this case is to allow state courts to consider the total financial picture of the veteran in establishing and enforcing child support awards. As stated by Justice Rutledge, while sitting in the United States Court of Appeals for the District of Columbia:

"The basic issue boils down to whether Congress intended to relieve the disabled insured to the extent of his disability payments from legally enforceable obligation to support his family and those legally

dependent upon him. So far as general creditors are concerned the purpose is clear, with the exceptions stated, to make the disposition of these funds a matter solely for his judgment. Congress regarded it as better for the creditors to go unpaid than to deprive the debtor and his dependents of this means of support when earning capacity would be cut off. Hence it used broad language prohibiting recourse to the fund by legal process. By removing it absolutely from the reach of such claims, to this extent it protected the insured from want during disability and the public from danger of his becoming a public charge. In ordinary circumstances also the exemption works a like protection of his dependents and of the public from their pauperization by his loss of earning power." *Schlaefel v. Schlaefel* (1940) 112 F.2d 177 at 185.

So, today, we honor veterans for their service to our country, but that honor does not mean that we can permit them to avoid the moral obligation to support their children. Had Congress been asked that question in 1975, it is ridiculous to suppose that it would have sanctioned an utter abrogation of the children's right to support in order to maintain sacrosanct the exempt status of the disability benefits.

Such an utter defeat of the dependents' rights will inevitably result, in certain circumstances, under apportionment. If the Appellant's and Solicitor General's view prevails, there will be circumstances where deserving children go hungry while their parent remains totally free from a support obligation. For example, although marital misconduct should not be a bar to the rights of innocent children to collect child support, in the apportionment scheme set forth in the Code of Federal Regulations, 38 C.F.R. 3.450-3.458, marital misconduct is a *total bar* to ap-

portionment. See 38 C.F.R. 3.458(b) and (c). Where is the logic or the justice in depriving children of any support remedy whatsoever because of the conduct of their custodial parent?

What remedy does the Solicitor General suggest for the children in such a situation? Should they go on welfare? Should they seek charitable help? The Solicitor General has no answer because there is no satisfactory answer if this court adopts his rationale. That Congress would sanction the prohibition of *any* child support for minor children due to the misconduct of a custodial parent is an incredible assertion that *amici curiae* do not believe anyone can make in good faith. In fairness, we can only surmise that the appellant and even the Solicitor General failed to note that apportionment, at best, is only a limited remedy to compel support of veterans' dependents. This oversight is, however, a critical weakness in any argument suggesting that Congress, by providing for apportionment, has preempted state courts from setting and enforcing support decrees.

That the apportionment remedy is not really a remedy at all is suggested by the noteworthy fact that in the *Handbook for Veterans Benefits Counselors*, (Handbook H-27-73-1 (Rev. 6-84), Department of Veterans Benefits), the VA, on pages III-1-1 through III-1-6 has listed 131 VA forms *not one of which* deal with apportionment. A government agency such as the Veterans Administration must *operate* with forms—the lack of one suggests strongly that no equitable treatment of minor children is available. In fact, it has been commented that “. . . the amount typically granted by a VA office is only the amount that the veteran receives extra because he has children.” 6 *Veterans Rights*

Newsletter (May-June 1986) at 3. In this case, that amount would be \$99.00, as contrasted with Mr. Rose's total tax-free monthly income of \$3422, not including his \$281 in monthly Social Security benefits. Brief for the United States as Amicus Curiae Supporting Appellant at 2. Congress categorically would not have intended, by means of protecting disability benefits from the hazard and uncertainty of civil execution, to thereby have created a system whereby certain children were deprived of their innate right to parental support.

Senator Montoya's comments at the time of the passage of Public Law 93-647 are appropriate:

“Mr. President, it seems clear to me that the civil or military services of the U.S. Government are dishonored when employees or former employees are allowed to become deadbeats and are protected from court action to collect family support money.” 120 Cong.Rec. S40339 (December 17, 1974).

III

THERE IS NO FEDERAL PREEMPTION IN THE CASE BEFORE THE COURT

In evaluating Mr. Rose's claim that federal law preempts state law, both Mr. Rose and the Solicitor General rely on *Hisquierdo v. Hisquierdo* (1979) 439 U.S. 572, and *McCarty v. McCarty* (1981) 453 U.S. 210.

It should first be noted that *Hisquierdo* clearly indicated that preemption under the Supremacy Clause was strictly limited:

“On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has ‘positively required

by direct enactment' that state law be preempted. *Wetmore v Markoe*, 196 US 68, 77, 49 L Ed 390, 25 S Ct 172 (1904). A mere conflict in words is not sufficient. State family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden. *United States v Yazell*, 382 US 341, 352, 15 L Ed 2d 404, 86 S Ct 500 (1966).'' *Hisquierdo v. Hisquierdo* 439 U.S. 572 at 581.

Hisquierdo and *McCarty* both dealt with the awarding of an interest in retirement benefits as part of a property settlement division. No case before this Court has dealt with the application of *Hisquierdo* to a child support claim.

At least one attempt has been made to apply *McCarty* to a claim for alimony. Ironically, it was the ex-wife who was seeking to reopen her divorce decree by alleging preemption of Ohio property law by *McCarty* in a settlement approved by the trial court. *Alexander v. Alexander* 20 Ohio App.3d 94, 484 N.E.2d 1068 (1985). She wished to reopen the matter to take advantage of the Uniformed Services Former Spouses' Protection Act, Pub. L. 97-252. The Court of Appeal rejected her attempt, noting that both before and after *McCarty*, Ohio law mandated that retirement benefits be considered (cf. the Veterans Administration General Counsel opinion of January 12, 1982, *supra*).

The Court of Appeal had no difficulty denying her claim, noting:

"... The difference between a trial court's power to divide property and the trial court's duty to consider a party's property in an adjudicatory disposition is one of substantial import. In the instant case, appellant has not shown that the distinction between the

two terms has merged to create inequity. (footnote omitted; emphasis added).'' 484 N.E.2d at 1070.

The closest that this Court has come to applying preemption to a child support claim is the case of *Ridgway v. Ridgway* (1981) 454 U.S. 46 in which the court refused to allow a state court to impose a constructive trust on Servicemens Group Life Insurance benefits contrary to the provisions of 38 U.S.C. section 770(a) and implementing regulations. In *Ridgway*, despite the fact that the claim of the minor children was involved, the majority noted, following *Wissner v. Wissner* (1950) 338 U.S. 655, that:

"Here, as there, it appropriately may be said: 'Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other.''' 454 U.S. at 56.

And further:

"There can be no doubt that Congress was aware of the breadth of the freedom of choice accorded the service member under the SGLIA." *Ibid*.

In reaching the conclusion that preemption was required the Court did not rely on the statutory anti-attachment provision alone; it made clear that 38 U.S.C. section 770(a) was evidence of Congress' intent to make the serviceman's beneficiary designation an exclusive one.

Congress' intent in enacting the anti-attachment provision governing the veterans' compensation benefits has not been supplemented with any designation that Veterans Administration benefits are to be unavailable for the dependents of veterans. In fact, quite the contrary appears to be true; as veterans' compensation is a replacement

for lost earning capacity,³ the minor children would be entitled to look to that capacity for payment of support.

The anti-attachment provision regarding veterans' benefits is of long standing duration, and dates back to at least 1935.⁴ Likewise, apportionment dates back to at least 1940.⁵

Thus, the antiattachment provision and apportionment have been a part of the law of this country for over 45 years. Over the intervening period, Congress has had numerous opportunities to correct what the Solicitor General believes is a misinterpretation of law in numerous state court decisions and it has not done so. Unlike the matter of Servicemens' Group Life Insurance, discussed in *Ridgway, supra*, Congress has not spoken with "force and clarity" to indicate that it has preempted the subject of support of disabled veterans' dependents and that state courts must thus relegate all such matters to the Veterans Administration. That opportunity has come before Congress because of legislation to increase those bene-

³ H.Rep. 96-1155 reprinted at (1980) 4 U.S. Code Congressional and Administrative News 3307 at 3310, notes that veterans' disability compensation is designed to replace "impaired earning capacity of veterans disabled as a result of their military service."

⁴ See Act of August 12, 1935, 74th Cong., Sess. I, ch. 510, section 3 (current version at 38 U.S.C. 3101(a)).

⁵ Act of October 17, 1940, 54 Stat. 1195, 76th Cong., 3d Sess., ch. 893, section 3 (current version at 38 U.S.C. 3107).

fits. We are thus left with a much more murky record than the Solicitor General would have us believe.⁶ As

⁶ Indeed, at the House debate on P.L. 93-647, the question of veterans benefits came up:

Mr. O'NEILL. Mr. Speaker, may I ask, we were talking about a garnishee, can anyone garnishee social security, unemployment compensation, and veterans' checks?

Mr. PETTIS. I would like to advise the distinguished majority leader that that question was answered in the earlier colloquy with the gentleman from California (Mr. McFall).

Mr. O'NEILL. I am sorry. I was not here at that time. What was the answer?

Mr. PETTIS. If there are other Federal payments, it is not unemployment compensation that is garnished.

Mr. O'NEILL. Can we garnishee social security checks and veterans' benefits checks?

Mr. PETTIS. Yes, under some circumstances, they could be.

Mr. O'NEILL. What about unemployment compensation checks?

Mr. PETTIS. No they cannot be garnisheed.

Mr. O'NEILL. The reason I am making this inquiry, I had just received a telephone call from one of the legislative directors of an organization downtown and I am sure that he mentioned those three things. But the gentleman says it is true as far as social security and and as far as veterans benefits?"

Mr. PETTIS. Yes." 120 Cong. Rec. H. 41813 (December 20, 1974).

And further:

"Mr. WHITE. Mr. Speaker, does the recipient beneficiary have to be a legal resident or a citizen of this country under the conference report?

Mr. PETTIS. She is subject to the same rules and regulations and laws as pertain today.

Mr. WHITE. In other words, a citizen of Vietnam or a citizen of Germany or any other place in the world could come to the United States, establish a judgment in the courts of the United States, and collect under this law, if passed and signed, and receive garnishment against the social security or veterans benefits?

Mr. PETTIS. If she could qualify for welfare today, she could under this act." 120 Cong. Rec. H. 41814 (December 20, 1974).

commented by the Veterans Administration General Counsel, the enactment of 42 U.S.C. 662(f)(2) by Pub.L. No. 95-30 has a sparse legislative history and "does not provide an explanation for the restriction placed on the garnishment of Veterans Administration benefits." (OP G.C.-4-84, *supra* at 3).

In his brief in support of the petition for writ of certiorari, the Solicitor General argues that there is a substantial conflict between state courts on this issue. A careful examination of the cases he cites belies that assertion.

Parker v. Parker, 355 Pa.Super. 348, 484 A.2d 168 (1984) was on opinion of the Superior Court of Pennsylvania that service-connected disability benefits paid by the Veterans Administration could be considered in determining the amount of alimony pendente lite to be awarded to the wife. The Pennsylvania court concurred with the rationale of the Veterans Administration General Counsel opinion of January 12, 1982, *supra*, that there was no bar to the state court considering the amount of the benefits in determining the amount of the support award, while conceding "that these payments *in the hands of the government* are not subject to legal process brought for the enforcement of appellant's legal obligation. . . ." 484 A.2d at 170 (emphasis added).

In *Cohen v. Murphy*, 368 Mass. 144, 330 N.E.2d 473 (1975) the Massachusetts Supreme Judicial Court was considering a contempt citation. The alleged contemnor had failed to pay his support. The Supreme Judicial Court held that Social Security and Veterans Administration benefits should be credited against the support due and thus the contempt judgment would require reversal. How-

ever, it declared, parallel with *Parker* that the federal benefits could be considered in determining the amount of the child support to be ordered.

In *Pishue v. Pishue*, 32 Wash.2d 750, 203 P.2d 1070 (1949) the minor child was evidently receiving some money through the apportionment process, \$13.80 per month. The trial court ordered the respondent to pay \$35.00 per month out of his veterans' benefits considering all the equities of the case.

In *re Gardner*, 220 Wis. 493, 264 N.W. 643 (1936) dealt with funds invested by the guardian in a mortgage and United States Treasury Bonds which were held subject to the claims of creditors under well established precedent. See Kimbrough and Glen, *American Law of Veterans*, (2d Ed., 1954) section 46.

Gaskins v. Security First National Bank of Los Angeles, 30 Cal.App.2d 409, 86 P.2d 681 (1939) was a guardianship case in which the plaintiff sued the guardian of an incompetent veteran to recover for services rendered to the veteran's minor children. In concluding that she had the right to recover for those services, the Court of Appeal commented:

" . . . we cannot conceive that it was the purpose of the government to prevent the probate courts in guardianship proceedings from authorizing the application of these funds to the needs of the Veteran's children, even though the funds are derived from the government. The obligation of a father to support his minor children is not a *debt* contemplated by this act of Congress, but is an obligation growing out of the parental status and public policy, the performance of which can ordinarily be compelled by imprisonment as well as judgment and writ of execution; and we

cannot assume that the Federal government ever intended to throw around these federal funds legal strictures that would permit or enable the beneficiaries thereof to refuse to discharge their duty to support their children." 86 P.2d at 685. (emphasis in original).

The decisions cited by the Solicitor General for the proposition that there is no jurisdiction over VA benefits are:

In re Marriage of Hapaniewski, 107 Ill.App.3d 848, 438 N.E.2d 466 (1982), a case in which the question on appeal was whether the trial court erred in dividing marital property. Child support was not at issue, and the court followed *McCarty v. McCarty*, *supra*. Although the trial court's division of property was reversed because no valuation was placed on the husband's veterans' benefits, the court upheld the doctrine that those benefits would be considered when the property was being divided. This is a position entirely consistent with that of the VA General Counsel in their opinion dated January 12, 1982, *supra*.

The next case cited, *Rickman v. Rickman*, 124 Ariz. 507, 605 P.2d 909 (Ct. App., 1980), also dealt with the issue of the division of property, not child support. Like this court in *Hisquierdo*, the Court of Appeals of Arizona held that the service-connected disability benefits were not marital property to be divided. Ironically, however, the court remanded the case "for a new determination as to spousal maintenance and child support, bearing in mind that appellant had an income of \$810 from disability benefits while appellee had a monthly income of \$175." 605 P.2d at 912. On the support issue, therefore, *Rickman* is entirely consistent with the position *amici* are urging.

Ex Parte Burson, 615 S.W.2d 192 (Texas Sup. Ct., 1981) was also a division of property case, noting "Veterans Administration benefits are not divisible property." 615 S.W.2d at 196.

Since most of the cases the Solicitor General cites as in conflict with *amici*'s position do not deal with the issue of child support, and when they do, deal favorably with that question, *amici* believe that the state of the law in this area as summarized in 1954 is still valid, and in fact, is accorded remarkably consistent interpretation by the states:

"The federal statute exempting veterans' benefits from the claims of creditors is held not to exempt such funds from a wife's claim for alimony. Alimony may be allowed by a court out of exempt veterans' benefits. The wife, in such a case, is not a 'creditor,' within the meaning of the statute. Moreover, an award of alimony is not a debt, but represents the judgment of the court as to the manner in which the husband shall be required to perform his marital and public duty. Under this doctrine, exempt funds may be subjected to an allowance to a divorced wife of a veteran for the support of their child, or for her attorney's fee incurred in divorce proceedings." Kimbrough and Glen, *American Law of Veterans*, (*supra*) section 48 (footnotes omitted).

The only case arguably on point that the Solicitor General has cited in support of the proposition that Veterans Administration benefits cannot be considered either for establishment of child support or enforcement of such support is *In re Irish*, *supra*, a contempt case. And, although in its rather pithy opinion the Supreme Court of Idaho endorsed the position now taken by the Solicitor General, the lengthy and well-reasoned dissent of Justice Budge is far more persuasive:

" . . . It was never the intention of legislative bodies to enact exemption statutes whereby a father, by availing himself of such [exemption] provisions, might relieve himself of the natural and legal duty to support and maintain his minor children. Furthermore, the act providing for adjusted compensation, which is practically the same as a pension, indicates strongly that such compensation is for the benefit not only of the veteran entitled thereto, but of his dependents, and has been so construed. If the veteran had died before making application, or after application but before issuance of certificate, the amount of his adjusted service credit shall 'be paid to his dependents' (World War Adjusted Compensation Act section 601, as amended by Act July 3, 1926 section 6 [38 USCA section 661])" 9 P.2d at 502.

Current law likewise provides for the surviving spouse and children of a 100% disabled veteran. See *Guide to Veterans Benefits* (Vietnam Veterans of America Legal Services, Rev. Ed., 1985) at p. 3-32, section 3.7.3.

In an exhaustive annotation, *Enforcement of Claim for Alimony or Support, or for Attorneys' Fees and Costs Incurred in Connection Therewith, Against Exemptions*, (1957) 54 ALR2d 1422 at 1436, the annotator is only able to cite three cases including *In re Irish, supra*; *Brewer v. Brewer* (1933), 19 Tenn.App. 209, 84 S.W.2d 1022; and *Riker v. Riker*, 160 Misc. 117, 289 N.Y.S. 835 (1936) which would lend support to Mr. Rose's position. *Riker v. Riker* involved an attempt to sequester a veteran's bonus bond, obviously attacking the corpus of the fund itself, for the collection of alimony and commented that the "law of the United States imposes no duty upon a husband to support his wife." Whereas that may be so in the case of alimony, the fact is that in enacting Title IV-D of the Social Security Act, 42 U.S.C. 651 et seq., Congress has explicitly

recognized the rights of children to child support from their parents. Likewise, *Brewer v. Brewer, supra*, treated the wife as any other creditor; whereas again, in this case, we are talking about the children.

CONCLUSION

A review of the cases dealing with support of children reveals virtually no conflict in them; hardly any of them provide even limited support for Mr. Rose's and the Solicitor General's position. The states, it appears, have had no difficulty discerning Congressional intent. It is clear to the undersigned, based upon the consensus of opinions of courts which have considered this issue, that there is no prohibition against states making their own evaluation of the needs of dependent children and rendering their own determination as to a parent's reasonable support liability. Furthermore, that judgment for support may be enforced by a citation for contempt if it is wilfully disobeyed. While the children lived with their father his full disability benefits were available to be drawn upon for their support. This resource does not cease to exist once the family is divided, and fairness and common sense dictate that it must be considered in setting Mr. Rose's support obligation. The Solicitor General, in n.13 at 12, Brief for the United States as Amicus Curiae Supporting Appellant, almost concedes as much. By the same reasoning the fact that Mr. Rose has this source of income is relevant in determining whether or not his refusal to abide by the court's decree is contumacious behavior. There has never been any allegation that \$800 per month is an excessive amount of support for Mr. Rose's two children, nor has any evidence been presented that Mr. Rose himself

will be seriously disadvantaged if he is compelled to pay that amount toward their maintenance. Mr. Rose did not question the support award when it was rendered and, apparently, he would not protest if the Veterans Administration made an apportionment of his disability benefits in an amount which could be higher or lower than the state court's award. Presumably he hopes that an apportionment, if the Veterans Administration even deigns to grant one, will be of a lesser amount than the \$800 per month ordered by the court.

It is difficult to understand what Federal interest will be damaged by permitting states to make and enforce their own child support orders in cases which concern disabled veterans. Unlike *Hisquierdo* and *McCarty* there is no attempt by the court below to issue an order affecting determination of a right to property which ultimately is in the hands of the Federal government. In fact both of those cases conceded that spousal support could have been ordered, *Hisquierdo*, supra 439 U.S. at 576-577, 586-587, *McCarty*, supra, 453 U.S. at 235; it was merely decreed that the pensions themselves were not property which could be divided. Appellant may purge himself of contempt in a variety of ways. He may pay his child support out of his exempt property, or as counsel for appellant appears to concede, Brief for Appellant at 47, by disposing of non-exempt property. He can seek a modification of the support order if his circumstances have changed. He can demonstrate to the court that he requires all of his disability compensation and thereby show that his failure to pay child support is beyond his control.

Apportionment of veterans' disability benefits is an administrative procedure which dependents may resort to

when all else fails. There is no indication that Congress intended to usurp the authority of state courts to enter any award of child support deemed fair and appropriate in light of *all the circumstances* of the parties. And there is certainly no indication that Congress intended apportionment to be the sole remedy when a family separates. Apportionment is a limited remedy. It applies only if the recipient spouse is meritorious. It is ill-defined; there are no detailed guidelines to follow (cf. Congress' requirement that the states establish uniform child support guidelines 42 U.S.C. 667 (1984)). Finally, and of critical importance, apportionment is an entirely discretionary process except as to the additional benefits payable for dependents (see VA Manual M21-1, *Adjudication Procedure* par. 26.05(b)(1)), and there is no judicial review.

Since apportionment is an almost entirely discretionary procedure, it simply doesn't work in many if not most cases. Yet appellant asserts that it is somehow intended to displace two hundred years of evolution and refinement of the law dealing with a parent's obligation to support his or her children. *Amici* submit that this was not the intent of Congress in enacting 38 U.S.C. 3107. *Amici* further submit that 38 U.S.C. 3101(a) and 42 U.S.C. 662(f)(2) should be construed literally as barring only collection remedies in the form of levy upon exempt benefits.

Because there is no federal preemption, the judgment of the Court of Appeals of Tennessee should be affirmed.

Respectfully submitted,

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